(3) (4)

No. 84-1555 AND No. 84-1567

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

JOHN L. CONNOLLY, ET AL., each in his respective capacity as Trustee of the OPERATING ENGINEERS PENSION TRUST.
Appellants,

VS.

PENSION BENEFIT GUARANTY CORPORATION,
Appellee.

WOODWARD SAND CO., INC.,
Appellant,

VS.

PENSION BENEFIT GUARANTY CORPORATION,
Appellee.

On Appeal from a Three Judge Court of the United States District Court for the Central District of California

JOINT APPENDIX

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No 84-1555 Docketed Mar. 27, 1985.
No 84-1567 Docketed Apr. 1, 1985.
Probable Jurisdiction Noted and Cases Consolidated June 10, 1985.

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JOINT APPENDIX

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DOCKET ENTRIES

6/17/75

1. Fld complt. Issd summs.

* * *

9/2/75

5. Fld Detf's ANSWER to Complt

* * *

12/5/75

8. Fld pltfs' note of motn of & motn of pltfs' for S/J, alternative applic for convening of 3-judge crt.

* * *

9. Fld deft Stip re motn for S/J.

10. Fld pltfs' memo of P/A in support of motn for S/J.

12/30/75

11. Fld Stip for Deft re motn for S/J.

12. Fld Deft's memo of P/A in oppos to Pltfs' motn for S/J & in support of Deft's x-motn for S/J.

12/31/75

13. Fld deft's proof of service by mail, served memo of P/A in oppos to pltfs motn for S/J & in support of defts motn for S/J; memo of P/A in oppos of applic for Convening a 3-Judge Crt; note of motn & motn of defts for S/J; S/J for deft Pension Benefit Guaranty Corp (proposed); findings of fact & concl of law (proposed).

*12/30/75

14. Fld deft's note of motn & motn retbl 1/19/76 9am of deft for S/J.

15. Fld deft's memo of P/A in oppos to applic for convening a 3-Judge Crt.

* * *

1/9/76

17. Fld pltfs' reply to deft's oppos to motn for S/J; oppos to deft's amended x-motn for partial S/J.

* * *

19. Fld pltfs' reply to oppos to altern applic for convening a Three-Judge Crt.

* * *

1/13/76

21. Fld Stip & ORD deft's note of motn & motn of deft for summary jdgmt & ord for summary jdgmt for deft Pension Benefit Guaranty Corp be amended by substituting the docs attached & read as note of motn & motn of deft for part summary jdgmt & ord for part summary jdgmt for deft Pension Benefit Guaranty Corp.

22. Fld deft Pension Benefit Guaranty Corp's amended note of motn & motn for part summary jdgmt, retble 1/19/76 at 9AM.

1/19/76

23. MIN ORD: hrg pltfs motn for S/J or in altern applic for conveng 3-Judge Crt. deft's motn for S/J. PTC.Crt ORDS motn tkn under subm.

* * *

2/12/76

25. Fld ORD Granting S/J for Pltf's & Deft to return to pltf the sum of $12,043 plus intrest from dt sd sum was pd to deft & sd defts are enjoined from acting in any manner inconsistent with the jdgmt. (Ent 2/12/76 m/cpys & ntfd prtys)

2/18/76

26. Fld S/J for pltfs & ORD thereon that S/J be in fv pltfs & agnst deft, that pltfs recvr from deft the sum of $12,043.00, + intrest, atty fees & costs; Fur Ord that sd Pension Plan is a contribution plan w/i the meaning of 29 USC §1002(34) & Fur ORD deft, etc are enjoined in any manner inconsistent with the jdgmt. (Ent 2/18/76) JS-6 Mld corrected copy of notc of entry. (JM)

* * *

5/11/76

43. Fld ORD Dnyg deft's mot for ord to alter or amnd jdgmt. (Ent 5/12/76)

* * *

7/7/76

45. Fld deft Pension Benefit Guaranty Corp NOTICE OF APPEAL fr judgmt ent 2/18/76 & 5/12/76.

* * *

9/18/78

Recd fm C/A copy of jdgmt reversing & remanding case to U.S. Dist. Crt.

* * *

3/8/79

57. Fld copy frm Supreme Crt of the U.S. ORD: this Crt that the sd petn & the same is hereby DEN.

3/19/79

58. MIN ORD: Filing & Spreading of the 9th Cir Mandate. Crt ORD reversing & remanding this matter fld & Spread. The matt fur instrucs cnsl to fl a timely notc motn as to their req for a Three Judge designated Crt. (ENT 3/27/79)

* * *

3/20/79

60. Fld notification & req for disign of three judgmt Crt.

4/25/79

61. Fld pltf's suppl memo re appl for conv 3-judge crt.

5/7/79

62. Fld dft's response to suplmntl memo re appl fr conveng a 3 jdg crt.

9/14/79

63. Fld ORD decling the trustees mv for convocatn of a 3-judge crt to hr its constitutnl claim that regulatns of Pension Benefit Guaranty Corp infringe upon their right to contract & deprive them of property w/o due process (Ent 9-17-79) mld cpys & notcs

9/26/79

64. Fld pltf's P&A in supp of motn to reconsider & amd ord re three-judge crt

65. Fld pltf's motn to reconsidr & amd ord re three-judge crt

66. Fld pltf's aff of Wayne Jett

* * *

10/22/79

68. Fld pltf's reply in supp of mtn to reconsider & amd ord re 3-Judge crt

*10/15/79

69. Fld deft's oppos to mtn to reconsider & amd ord re 3 Judge crt

10/29/79

70. MIN ORD: pltf's mtn to reconsider & to amd ord re 3 Judge Crt; amd to three judge court; mtn is DENIED

11/1/79

71. Fld deft's notc of mtn &mtn for S/J

72. Fld deft's memo of P&A in supp of mtn for S/J

11/9/79

73. Fld pltf's oppos to mtn for S/J

11/16/79

74. Fld deft's rply to pltfs oppos to mtn for S/J

11/19/79

75. MIN ORD: deft's mtn for S/J, crt to mk dec af C/A has ruld

1/21/80

Rec'd fr C/A a copy of ord that petn for writ of mandamus is denied

11/7/80

76. Fld deft suppl. memo of P&A in suppt of mot for S/J

3/24/81

77. Fld Fndgs of Fact & Concls of Law (DWW)

78. Fld ORD (DWW) grtg mot of Pension Benefit Guaranty Corp for S/J in fav of deft & agnst pltfs in their capacities as Trustees of the Operating Engrs Pension Trust. (ENT 3-26-81) Mld cpys & notcs to prtys.

* * *

*4/24/81

81. Fld pltf's JT NOTC OF APPEAL to 9th Cir C/A frm Ord ent 3-26-81 $70.00 fldng & docket fees pd.

* * *

5/13/82

84. Fld notc of hrg on fi & spread jdmt of C/A, retnble 6/21/82, 9AM.

*5/5/82

85. Fld cpy of USCA ord reversing & rem w/directns the jdmt of USDC, fld & ent 4-9-82.

6/21/82

86. MIN ORD: Crt ORD(DWW) the mandate frm USCA reversing & rem w/directns the decisions of this crt decision be fld & spread on the minutes of this court; Crt will sign form of ord subm re: notif of 3 Judge Court. (ENT 6-24-82) MD JS/5.

6/21/82

87. Fld notfcatn & req for desig of 3 judge crt.& ORD(DWW) that notc be fld & cpys mld to chief judge J. Browning & cnsl of rec.

7/26/82

88. Fld pltfs notc of mot & mot fr lv to fi lst A/C, retnble 8-16-82, 9AM

89. Fld pltfs memo of P&A In suppt of mot for lv to fi lst A/C

8/16/82

90. Fld pltf's lST AMD COMPLT, ıssd sms.

*8/11/82

91. Fld plts, reply in suppt of mot to lv to fi lst and complt.

92. Fld PBGC's req fr lv to fi opp late

93. Fld PBGC's opp to pltfs' mot ft lv to fi lst and complt

94. MIN ORD: Hrg on pltf's mot fr lv to fi lst and complt hld; Crt(DWW) mot GRANTED; ea of the ptys in all future fi subm sufficient copys fr each of the judges w/intials reflected on its face.

9/27/82

95. Fld R.Freeman's declar in supp of mot to intervene.

96. Fld Intervenor's notc of mot & mot to intervene

97. Fld Intervenors' memo of P&A In suppt ofmot to intervn; req for judical notc.

* * *

10/4/82

99. Fld Pltfs' Statement of non-oppos to motn to intervene.

10/12/82

100. Fld deft's oppos to motn to intervene.

10/18/82

101. Fld Intervenors' reply brief in suppt of motn to intervene.

102. Fld Intervenors' suppl declaration of Richard M. Freeman in Sppt of motn to intervene.

* * *

11/15/82

107. Fld deft's ANSWER to 1st A/C.

11/10/82

108. Fld Pltfs' response to arguments concerning intervention.

11/29/82

109. Fld Stip & Ord (DWW) that grants of PBGC motn will serv the end of justice & pltf do not opp the granting of PBGC motn & motn of deft to set aside deflt vacated (ENT 11/30/82) Mld cpy

12/6/82

110. MIN ORD: intervene motn is submitted

12/14/82

111. Fld ORD(DWW) applicants' motn for interventn as a mttr of right undr Rule 24(a)(2) is DENIED. Applicants' motn to permissively intervene undr Rule 24(b)(2) is GRNTED on condition that they do not litigate beyond the scope of pltfs' First Amended Complaint. (ENT 12/15/82). Mld cpys/notes.

2/10/83

112. Fld pltfs CMPLNT IN INTERVENTION.

* * *

5/13/83

114. Fld pltfs P&AS in suppt of motn fr S/J.

115. Fld pltfs declartn of Leo A. Majich.

116. Fld pltfs notc of motn & motn fr S/J retnbl 6/6/83, 9 am.

117. Fld pltfs declartn of Joseph H. Seymour.

5/16/83

118. Fld intervenors declratn of George N. Dumas.

119. Fld intervenors declratn of Anne Vaughan.

* * *

6/23/83

127. Fld intervenors notc of motn & motn for S/J.

6/23/83

128. Fld intervenrs memo of P&A in suppt of motn fr S/J.

129. Fld intervenrs declratn of George S. Howard, Jr.

* * *

6/28/83

132. Fld pltfs notc of motn & motn for protectv ord agnst fur dscvry retnbl 7/11/83, 9 AM.

133. Fld deft memo in suppt of motn to strike declratns & exhs fld by pltfs & intervenors.

134. Fld deft notc of motn & motn to strike declratns & exhs fld by pltfs & intervenors.

135. Fld deft memo in suppt of applic fr ord shrtng ti fr hrng on motn.

136. Fld deft applif fr ord shortng ti fr hrng on motn.

137. Fld pltfs' P&A in suppt of motn fr protectv ord agnst fur dscvry.

138. Fld ORD (DWW) that motn fr P/O agnst fur dscvry by deft shall be placed on cal fr hrng on 7/11/83, 9 AM.

139. Fld pltfs' opp to deft's motn to strike.

7/1/83

140. Fld intervenors opp of pltfs in-interventn to deft Pension Benefits Guaranty Corp's motn to strike exhs fld by pltfs & intervenors.

141. Fld intervenors respo in suppt of pltf's motn fr protectv ord agnst fur dscvry.

* * *

7/12/83

142. Fld deft ANSWER TO CMPLNT.

* * *

145. Opp to mont fr protectv ord agsnt fur dscvry, Defendant

7/11/83

Crt & ensl confer & Crt hrs oral argumnt & deems motn fr protectv Ord & agnst fur dscvry submitted. MO

7/12/83

146. Declar of Peter H. Gould.

7/25/83

147. Ord denying motn to strike pltf's exhs is DENIED. Deft's motn to strike intervenor's exhs is DENIED. Pltfs' motn fr Protectv Ord is DENIED w/o prej. Issd

148. Ord of Crt will not consider any fur delays of motns fr s/J & Pension Benefit Guaranty Corp will file a respo to merits of these motns w/in one week of ord of face deflt.

8/2/83

149. Oppos to motn fr S/J. Defendant

* * *

8/10/83

167. Ord motn be cont'd frm 8/15/83 to 10/24/83, 9AM. No fur conts will be granted. Issd

8/11/83

168. Reply memo of intervenors to deft's opp to motn fr S/J. Plaintiff

8/16/83

169. Reply memo in suppt of motn fr S/J. Plaintiff

* * *

8/31/83

171. ORD that deft's otn fr a recon is DENIED & crt suspends all dscvry until S/J motn is decided.

* * *

9/13/83

176. Ord that cont of hrng in case was solely fr purpose of permitting PBGC to free one of its attys to argue case & was not fr purpose of allowing addit'l dscvry or recv'g addit'l briefing. Motn to permit fur dscvry is DENIED. Issd

* * *

10/24/83

181. MO: Pltfs & intervenors mtns for s/j argued & deemed subm.

* * *

5/1/84

189. ORD granting s/j to deft. (ENT 5-2-84) Mld cpys & notc. JS 6

5/17/84

190. Suggestion for modif of opinion & ent of jdmt. Deft.

5/23/84

191. Opp to pension benefit guaranty's suggestn fr modif of opinion & entry of jdmt-pltf

5/22/84

192. Reply to defts suggetn for modif of opinion & ent of jdmt-pltf

* * *

11/3/84

202. Judgmnt & ORD in favor of deft. Deft shall recover from pltfs its costs incurred during pendency of litigation & from pltfs in-intervent its costs of litigation of issues argued by pltfs-in-intervent. (ENt 12/4/84) mld copys/notes.

12/17/84

203. Note of mot to altr or amnd jdmt 2-4-85 9:00am deft

Memo of P&A in suppt of mot to alter or amnd jdmt deft

1/3/85

204. Pltf's opp to deft's mot to alter or amd jgmt. 2-4-85 at 9 AM

* * *

1/31/85

212. Pltfs-in-intrvntn's NOTC OF APPEAL to the U.S. Supreme Crt frm final jdmt ent 12/4/84. Billed for $5.00 flng fee.

1/31/85

213. Pltf's NOTC OF APPEAL to the U.S. SUPREME COURT frm fin jdmt ent 12/4/84. $5.00 flng fee

* * *

3/20/85

215. Pltf's NOTC OF APPEAL to U.S. SUPREME COURT frm fin jdmt ent 12/4/84. $5.00 flng fee pd.

* * *

COMPLAINT FOR DECLARATORY JUDGMENT, DAMAGES, INJUNCTION

[Filed June 17, 1975.]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 75 2037 DWW

JOHN L. CONNOLLY, C. V. HOLDER, HOWARD C. DENNIS,
JOHN C. MAXWELL, JAMES J. KIRST,
C. WILLIAM BURKE,
KENNETH J. BOURGUIGNON, JOSEPH H. SEYMOUR, RICHARD L. CORBIT,
HAROLD EDWARDS, DONALD E. MIER,
WILLIAM C. WAGGONER, RICHARD GANNON
and ALFRED HARRISON,
each in his respective capacity as Trustee of the Operating Engineers Pension Trust,
Plaintiffs,

vs.

PENSION BENEFIT GUARANTY CORPORATION
a non-profit corporation established within the Department of Labor of the United States of America.

Defendant.

1. The jurisdiction of this Court is invoked under Section 4003(f) of the Employee Retirement Income Security Act of 1974 [29 U.S.C. § 1303(f)].

2. Plaintiffs JOHN L. CONNOLLY, C. V. HOLDER, HOWARD C. DENNIS, JOHN C. MAXWELL, JAMES J. KIRST, C. WILLIAM BURKE, KENNETH J. BOURGUIGNON, JOSEPH H. SEYMOUR, RICHARD L. CORBIT, HAROLD EDWARDS, DONALD E. MIER, WILLIAM C. WAGGONER, RICHARD GANNON and ALFRED HARRISON (herein called the

"Trustees") are trustees and together constitute the Board of Trustees of the Operating Engineers Pension Trust (herein called the "Trust"), and bring this action in their official capacities as such.

3. The Trust is a joint labor-management trust created and existing in conformance with Section 302(c)(5) of the Labor-Management Relations Act of 1947, as amended in 1959 [29 U.S.C. §186(c)(5)]. The principal office of the Trust is located in the County of Los Angeles, State of California.

4. Defendant Pension Benefit Guaranty Corporation (herein called the "Corporation") is a non-profit corporation established within the Department of Labor of the United States of America by Section 4002 of the Employee Retirement Income Security Act of 1974 [29 U.S.C. §1302].

5. The Trustees administer a pension plan (herein called the "Plan") established pursuant to the Trust. A written Agreement Establishing the Operating Engineers Pension Trust (herein called the "Trust Agreement") was executed in 1960 by certain employers (herein called the "Employers") and the International Union of Operating Engineers, Local No. 12, (herein call the "Union"). At all times the Trust Agreement has contained a provision in Article II, Section 7, thereof as follows:

> "Neither the Employers nor any Signatory Association, or officer, agent, employee or committee member of the Employers or any Signatory Association, shall be liable to make Contributions to the Fund or be under any other liability to the Fund or with respect to the Pension Plan, except to the extent that he or it may be an Individual Employer required to make Contributions to the Fund with respect to his or its own individual or joint venture operations, or to the extent he or it may incur liability as a Trustee

> as hereinafter provided. Except as provided in Article III hereof, the liability of any Individual Employer to the Fund, or with respect to the Pension Plan, shall be limited to the payments required by the Collective Bargaining Agreements with respect to his or its individual or joint venture operations, and in no event shall he or it be liable or responsible for any portion of the Contributions due from other Individual Employers or with respect to the operations of such Individual Employers. The Individual Employers shall not be required to make any further payments or Contributions to the cost of operations of the Fund or of the Pension Plan, except as may be hereinafter provided in the Collective Bargaining Agreements."

The collective bargaining agreement between the Union and the Employers at all times has bound the Employers to abide by the Trust Agreement and to pay a stated amount to the Trust with respect to each hour worked by (or paid) each employee covered by the agreement.

6. At all times the Plan has contained a provision in Article VII, Section 4 thereof, as follows:

> "This Pension Plan has been adopted on the basis of the actuarial calculation which has established, to the extent possible, that the contributions will, if continued, be sufficient to maintain the Plan on a permanent basis. However, it is recognized that the benefits provided by this Pension Plan can be paid only to the extent that the Plan has available adequate resources for those payments. No Individual Employer has any liability, directly or indirectly to provide the benefits established by this Plan beyond the obligation of the Individual Employer to make contributions as stipulated in any Collective Bargaining Agreement. In the event that at any time the Pension Fund does not

have sufficient assets to permit continued payments under this Pension Plan, nothing contained in this Pension Plan and the Trust Agreement shall be construed as obligating any Individual Employer to make benefit payments of contributions (other than the contributions for which the Individual Employer may be obligated by any Collective Bargaining Agreement) in order to provide for the benefits established by the Pension Plan. Likewise, there shall be no liability upon the Board of Trustees, individually or collectively, or upon the Employers, Signatory Association, Individual Employer, or Union to provide the benefits established by this Plan if the Pension Fund does not have the assets to make such benefit payments."

7. At all times the Plan has contained a provision in Article VIII, Section 2, thereof as follows:

"This Plan has been adopted on the basis of an actuarial estimate which has established (to the fullest extent possible) that the income and accruals of the Fund will be fully sufficient to support this benefit plan on a permanent basis. However, it is recognized as possible that in the future the income or the liabilities of the Fund may be substantially different from those previously anticipated. It is understood that this Pension Plan can be fulfilled only to the extent that the Fund has assets available from which to make payments. Consequently, the Board of Trustees may have prepared annually an Annual Actuarial Evaluation of the Fund and shall take the actuarial status of the Fund into account in determining amendment or modification of this Pension Plan."

8. The Corporation has no authority over any pension plan which provides for an individual account for each

participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains, and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account (herein called a "defined contribution plan"), unless the defined contribution plan promises a fixed benefit and the employer or his representative participated in the determination of that benefit.

9. The Plan is a defined contribution plan under which no fixed benefit is promised.

10. The Trustees heretofore applied to the Corporation for a determination that the Plan is a defined contribution plan and that the Corporation has no authority over the Plan. A true copy of the Trustees' written request for determination submitted to the Corporation is attached hereto as Exhibit "A" and by reference incorporated herein.

11. The Corporation has unlawfully and arbitrarily refused to determine the Plan to be a defined contribution plan, and has unlawfully and arbitrarily determined the Plan to be a defined benefit plan over which the Corporation exercises substantial control. A true copy of the written determination by the Corporation is attached hereto as Exhibit "B" and by reference incorporated herein.

12. The exercise of authority by the Corporation over the Plan has damaged the Trustees, and threatens further damage to the Trustees throughout the indefinite future, as follows:

(a) The Trustees have been required to pay and have paid to the Corporation the sum of $12,043.00 as a termination insurance premium in order to avoid assessment of a late payment charge not exceeding one hundred percent (100%) of said amount, plus

interest, and the Corporation threatens to require additional payments each in a similar or greater amount annually throughout the indefinite future.

(b) The Corporation has impaired the discretion and authority of the Trustees to administer the Plan in accordance with the Trust Agreement and the Plan by purporting to regulate, control and approve or disapprove modifications of the Plan by the Trustees.

(c) The Corporation's exercise of authority over the Plan violates and invalidates the express terms of the Trust Agreement and the Plan, which define the limit of the Employer's liability as the payments required by the collective bargaining agreements between the Employers and the Union, and substitutes therefor the unknown future cost of providing benefits described in the Plan. The Corporation requires the reporting of any amendment of the Plan which may decrease the benefits payable to any participant of the Plan, and the Corporation purports to hold the authority to approve or disapprove any such amendment of the Plan. Pursuant to the Corporation's action, any amendment to the Plan which may increase the benefit payable to any participant of the Plan would correspondingly increase the liability of the Employers. Any such increase in liability of the Employers will cause bargaining between the Employers and the Union on the subject of the amendment to the Plan and thereby, deprives the Trustees of the discretion and control of the Plan necessary to perform their duties as fiduciaries to administer the Plan in the interest of the participants and in accordance with the terms of the Trust Agreement and the Plan.

(d) The Corporation imposes on the Employers and all other contributing employers of the Plan the risk of liability to the Corporation in an amount as much as thirty percent (30%) of the net worth of each employer. Further, the Corporation purports to have the authority to require the Employers and all other contributing employers of the Plan to pay to the Corporation substantial sums in amounts presently unknown as premiums to insure against the above-described risk.

13. The Corporation contends that such damages are caused the Trustees and such additional risk and liability are imposed upon the Employers and all other contributing employers of the Plan through the enactment of federal statutory law creating and empowering the Corporation and modifying the rights and obligations of the Employers, the Union, the Trustees and the participants under the pre-existing collective bargaining agreements, Trust Agreement and Plan. The Trustees contend that such contentions by the Corporation are arbitrary and contrary to the express terms of the statutory enactment; further, that the Corporation's contentions directly contravene the express terms of the collective bargaining agreements, the Trust Agreement and the Plan and giving legal effect to such contentions will impair the valuable consensual contract rights of the Employers, the Union, the Trustees and the participants; and, further, that the Corporation's actions and contentions hereinabove described seek and threaten to deprive the Employers, the Union, the Trustees and the participants of their just and lawful property without the due process of law and without just and adequate compensation.

14. The damages to the Trustees caused by the Corporation are continuing and irreparable. The Trustees have no complete remedy at law.

15. By reason of the foregoing, an actual controversy has arisen and exists between the Trustees and the Corporation with respect to wether the Corporation has erroneously applied the law to the facts to determine that the Plan is a defined benefit plan subject to the authority of the Corporation.

WHEREFORE, plaintiffs pray for damages, declaratory judgment and injunctive relief as follows:

1. Damages in the sum of $12,043.00, plus interest from the date said sum was paid to defendant, plus such additional sums, if any, which proof may show were paid to defendant by plaintiffs prior to judgment herein, and interest thereon;

2. A declaratory judgment that the Plan is a defined contribution plan which does not promise a fixed benefit and which is not subject to the coverage or authority of defendant; and

3. A permanent injunction restraining defendant, its agents, employees, representatives and all persons in concert with them from acting in any manner inconsistent with the judgment of this court herein to interfere with the rights of plaintiffs, their agents, employees, representatives and successors.

DATED: June 16, 1975

WAYNE JETT
Attorney for Plaintiffs

EXHIBIT A

WAYNE JETT
Lawyers

WAYNE JETT
ALBERT RUSH
TIMOTHY P. SULLIVAN

File No. 102

April 10, 1975

PENSION BENEFIT GUARANTY CORPORATION
P. O. Box 7119
Washington, D.C. 20044

SECRETARY OF LABOR
U.S. Department of Labor
P.O. Box 176
Washington, D.C. 20044
Attention: Labor Management Services Administration
Office of Employee Benefits Security

Re: Request for Determination of Status as
Defined Contribution Plan
Operating Engineers Pension Trust
Department of Labor WP-154662
Employer Identification No. 95-603-2478

Gentlemen:

This firm is legal counsel for the Board of Trustees of the Operating Engineers Pension Trust. Pursuant to the instruction and authorization of the Board of Trustees, this letter hereby requests determination of whether the Pension Plan of the Operating Engineers Pension Trust is an "individual account plan" ("defined contribution plan") or a "defined benefit plan" for the purposes of Section 4021 (b) (1) of the Employee Retirement Income Security Act of 1974 ("the Act"). The view of the Board

of Trustees is that the Pension Plan is an "individual account plan".

STATEMENT OF THE FACTS

The principal office of the Operating Engineers Pension Trust ("the Trust") is located at 3055 Wilshire Boulevard, Suite 200, Los Angeles, California 90010. The Department of Labor WP number of the Trust is WP-154662. The Employer identification number (EIN) of the Trust is 95-603-2478. The Pension Plan ("the Plan") of the Trust has been in existence since June 1, 1960. The Trust is tax exempt under the provisions of Internal Revenue Code Section 501(a) and the Plan is a qualified pension plan within the meaning of IRC §401(a).

The Trust is a joint labor-management trust formed and operated in compliance with Section 302(c) (5) of the Labor Management Relations Act of 1959 [29 U.S.C. §186(c) (5)]. The written Agreement Establishing the Operating Engineers Pension Trust (the "Trust Agreement") was executed December 13, 1960, on behalf of the International Union of Operating Engineers, Local Union No. 12, ("the Union") a labor organization representing employees in an industry affecting commerce, and certain employer associations, including the Associated General Contractors of America, Southern California Chapter, and other employer associations ("the Employers") representing employers in the construction industry in Southern California and Southern Nevada. The Trust was established by the parties to the Trust Agreement pursuant to collective bargaining agreements between the Union and the Employers which obligated the Employers to pay certain stated amounts of contributions into a trust to be organized for the purpose of receiving such contributions. The amount obligated by each signatory employer commenced at $.05 per hour of employment in

1960. That rate of contribution has been renegotiated through the process of collective bargaining at various intervals since 1960, and the currently effective rate of contribution is $1.50 per hour worked (or paid) as to each covered employee. The applicable provisions of the collective bargaining agreement currently in effect in Southern California has substantially the same content as contained in various collective bargaining agreements in effect since 1960. The current provisions contained in Article IX, Paragraph A, and Appendix B of the Master Labor Agreement between Southern California General Contractors' associations and the Union are as follows:

> "A pension fund known as the Operating Engineers Pension Trust has been established by the Contractors and the Union by an Agreement and Declaration of Trust dated December 13, 1960, and subsequently amended by the parties to this Agreement. The Contractors agree to abide by said Agreement and Declaration of Trust and further to make payments to the Fund in the amount designated in Appendix B of this Agreement. Participation by the Contractors in said Trust shall be for the duration of this Agreement and any renewals or extensions thereof, or for the period workmen are employed under the terms of this Agreement."

"APPENDIX B"

CONTRIBUTIONS PAYABLE TO TRUST FUNDS

Effective Date July 1, 1974

PENSION TRUST (Article IX) $1.50

> "... The above contributions will be made on the basis of straight time or overtime hours worked or paid each employee under the terms of this Agreement."

The Trust Agreement provides for administration of the trust fund by a Board of Trustees ("the Trustees"). One-half of the total number of Trustees on the Board of Trustees are appointed by the Union, and the remaining Trustees are appointed by the Employers. The Trustees hold, control and manage the assets of the Trust either directly or in the name of a corporate co-trustee in a common pool for the exclusive benefit of employees, retired employees and their beneficiaries pursuant to the provisions of the Plan. No employee, retired employee or beneficiary is entitled to receive any part of the contributions made or required to be made by an employer in lieu of the benefits provided by the Plan. No person has any right, title or interest in the assets of the Trust except as specifically provided in the Trust Agreement or in the Plan. Participants and beneficiaries are restrained by the Trust Agreement from selling, transferring, anticipating, assigning, hypothecating or otherwise disposing of any right or interest under the Plan. Interests under the Plan are not subject to transfer by operation of law or otherwise, and are exempt from legal or equitable process to the fullest extent permissible by law.

The Trust Agreement limits the scope of liability of the contributing employers in Article II, Section 7, thereof as follows:

> *"Neither the Employers nor any Signatory Association, nor officer, agent, employee or committee member of the Employers, or any Signatory Association, shall be liable to make contributions to the Fund or be under any other liability to the Fund or with respect to the Pension Plan, except to the extent that he or it may be an Individual Employer required to make Contributions to the Fund with respect to his or its own individual or joint Venture operations, or to the extent he or it may incur liability as a Trustee as hereinafter*

> *provided. Except as provided in Article III hereof, the liability of any Individual Employer to the Fund, or with respect to the Pension Plan, shall be limited to the payments required by the collective bargaining agreements with respect to his or its individual or joint venture operations, and in no event shall he or it be liable or responsible for any portion of the Contributions due from other Individual Employers or with respect to the operations of such Individual Employers. The Individual Employers shall not be required to make any further payments or Contributions to the cost of operations of the Fund or of the Pension Plan, except as may be hereinafter provided in the Collective Bargaining Agreements."* (Emphasis added.)

Article III of the Trust Agreement relates only to the collection of contributions obligated by the collective bargaining agreements, the employers' obligations to pay promptly, and remedies upon default by any employer.

The original Plan was attached to the Trust Agreement executed by the Union and the Employers. Thereafter, the Plan has been amended from time to time by the Trustees in accordance with the provisions of the Trust Agreement and the Plan.

The Plan provides for the accumulation of Prior Service Credits by each individual participant based upon yearly intervals of employment in the industry organized by the Union prior to the date the Plan was established (June 1, 1960). In addition, the Plan provides for the accumulation of Pension Credits by each individual participant, based upon one Pension Credit for each 1,000 hours of employment by a contributing employer after the date of commencement of the Plan at the rate of contribution stated in the Master Labor Agreement. However, if the contributing employer of the particular participant is obligated to pay contributions at a rate different from the

Master Labor Agreement rate, then said participant accumulates Pension Credits in direct proportion to the rate of contributions made on his behalf as compared to the Master Labor Agreement rate. For example, if a participant works 1,000 hours for an employer obligated to pay the Master Labor Agreement rate of $1.50 per hour, the participant acquires one Pension Credit for contributions amounting to $1,500.00. If another participant works for an employer obligated to pay only $1.00 per hour, then that participant acquires one Pension Credit for each 1,500 hours of employment. Thus, the Trustees maintain an individual account of hours worked by each participant and the rate of contributions paid by the employer for each such hour worked by that participant in the Plan.

The Plan provides for the payment of Normal Retirement, Early Retirement, Disability Retirement, Lump Sum Benefit at Retirement and Death benefits to a qualified participant or his beneficiary. The retirement benefits payable are based directly upon the exact number of hours worked by the individual participant under the Plan and the applicable rate of contributions as reflected in his accumulated Pension Credits, as well as Prior Service Credits. For example, a participant who qualifies for Normal Retirement on April 1, 1975, with 23.317 Pension Credits and 10.5 Prior Service Credits would be entitled to a monthly pension for the remainder of his life equal to 23.317 time $15.50 plus 10.5 times $8.00, or a total of $445.00 per month. Early Retirement and Disability Retirement benefits are computed in the same manner, except that Early Retirement benefits are actuarially reduced based upon the individual participant's age at the date of retirement. Death benefits are the payment of the monthly pension amount to a designated beneficiary for a period of ten years (plus, in the case of active participants, a lump sum equivalent to the lump sum benefit at

retirement described below), less the number of pension payments made to the participant prior to death, or at the participant's option a lump sum equal to $1,500.00 times the number of accumulated Pension Credits, less any retirement benefits paid prior to death. Also, the Plan provides for payment of lump sum benefits at retirement equal to $250.00 times the number of accumulated Pension Credits, not exceeding ten, of the individual participant.

Since its inception and presently, the Plan has contained provisions limiting the liability of the contributing employers in Article VII, Section 4, thereof as follows:

> *"This Pension Plan has been adopted on the basis of an actuarial calculation which has established, to the extent possible, that the contributions will, if continued, be sufficient to maintain the Plan on a permanent basis. However, it is recognized that the benefits provided by this Pension Plan can be paid only to the extent that the Plan has available adequate resources for those payments. No Individual Employer has any liability, directly or indirectly, to provide the benefits established by this Plan beyond the obligation of the Individual Employer to make contributions as stipulated in any Collective Bargaining Agreement. In the event that at any time the Pension Fund does not have sufficient assets to permit continued payments under this Pension Plan, nothing contained in this Pension Plan and the Trust Agreement shall be construed as obligating any Individual Employer to make benefit payments or contributions (other than the contributions for which the Individual Employer may be obligated by any Collective Bargaining Agreement) in order to provide for the benefits established by the Pension Plan. Likewise there shall be no liability upon the Board of Trustees, individually or collectively, or*

> *upon the Employers, Signatory Associations, Individual Employer, or the Union to provide the benefits established by this Plan if the Pension Fund does not have assets to make such benefit payments."* (Emphasis added.)

Further, the Plan has contained since its inception a provision for actuarial review in Article VIII, Section 2, thereof as follows:

> "This Plan has been adopted on the basis of an actuarial estimate which has established (to the fullest extent possible) that the income and accruals of the Fund will be fully sufficient to support this benefit plan on a permanent basis. However, it is recognized as possible that in the future the income or the liabilities of the Fund may be substantially different from those previously anticipated. *It is understood that this Pension Plan can be fulfilled only to the extent that the Fund has assets available from which to make payments.* Consequently, the Board of Trustees may have prepared annually an Annual Actuarial Evaluation of the Fund and shall take the actuarial status of the Fund into account in determining amendment or modification of this Pension Plan." (Emphasis added.)

On or before December 2, 1974, the Trust filed Form No. PBGC-1 with the Pension Benefit Guaranty Corporation as if the Plan were included in coverage of the plan termination insurance provisions of the Act. The Trust paid the estimated premium as set forth in Form No. PBGC-1 at that time in order to avoid any possible liability for interest and penalties which may be assessed under the Act in the event the Plan is determined to be a "defined benefit plan".

ANALYSIS

Section 4021 of the Act establishes the coverage of the plan termination insurance provisions (Sections 4001, *et seq.*) and, in Section 4021(b), provides as follows:

> "(b) This section does not apply to any plan —
>
> (1) which is an individual account plan, as defined in paragraph (34) of section 3 of this Act . . ."

Paragraph (34) of Section 3 of the Act provides as follows:

> "(34) The term 'individual account plan' or 'defined contributions plan' means a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account."

Also, Section 4021(c)(1) of the Act provides as follows:

> "(c)(1) For purposes of subsection (b)(1), the term 'individual account plan' does not include a plan under which a fixed benefit is promised if the employer or his representative participated in the determination of that benefit."

The Plan appears to be within the definition contained in Paragraph (34) of Section 3 of the Act in that the Plan as described above provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses experienced by the Trust. In accordance with IRC § 401(a)(8), the Plan provides that forfeitures must not be applied to increase the benefits any employee would otherwise receive under the Plan. However, forfeitures do occur under certain

break-in-service provisions of the Plan, and the purpose of IRC § 401(a)(8) appears to be to assure that conservative actuarial assumptions are used in designing the Plan. The requirement of Paragraph (34) of Section 3 for "an individual account for each participant" appears to be fully satisfied by current accounting for and recording of each and every hour worked by the individual participant and the concurrent recording of the contribution rate per hour of the related employer. This practice of maintaining the "individual account" is followed in order to achieve an accurate measurement of the entitlement of the individual participant, rather than accounting for actual funds as received on such participant, because the related employer may become delinquent by failure to pay timely contributions on one or more of his employees.

Further, the requirement of Paragraph (34) of Section 3 for "benefits based solely upon the amount contributed" is a clear reference to the "defined contribution" or "money-purchase" approach to providing retirement benefits. By this approach, the employer agrees to make certain payments into a plan, and any benefits to be provided are limited solely to whatever can be purchased with the obligated contribution. This approach contrasts with the "defined benefit" approach by which an employer promises certain benefits upon retirement and thereby becomes obligated to pay into the plan whatever contributions are necessary to provide the promised benefits. The Plan has at all times since its inception in 1960 expressly limited the liability of all contributing employers to the payment of certain contributions defined in the collective bargaining agreements. Article II, Section 7, of the Trust Agreement and Article VII, Section 4, of the Plan are self-explanatory and fully comprehensive in limiting the liability of each contributing employer to payment of the specific rate per hour as bargained for and set forth in each respective collective bargaining agreement.

Based upon the foregoing, it appears that the Plan is an individual account plan as defined in Paragraph (34) of Section 3 of the Act. Thus, the only remaining question is whether Section 4021(c)(1) of the Act in any manner affects the Section 4021(b)(1) exclusion of the Plan from coverage by plan termination insurance. Review of Section 4021(c)(1) indicates this question is properly answered in the negative. Again, Section 4021(c)(1) provides as follows:

> "For purposes of subsection (b)(1), the term 'individual account plan' does not include a plan under which *a fixed benefit is promised* if the employer or his representative participated in the determination of that benefit." (Emphasis added.)

Certain of the Trustees of the Trust are representatives of the contributing employers, and such Trustees have participated in adopting and amending the various provisions of the Plan relating to design of the benefits program. However, it is clear that the Plan is not one under which "a fixed benefit is promised". The benefits of the Plan are not "fixed" because such benefits are expressly required to vary according to the sufficiency of the obligated contributions to provide for the described benefits. Also, the benefits of the Plan are not "promised" except upon the express conditions set forth in Article II, Section 7, of the Trust Agreement and Article VII, Section 4, of the Plan. Thus, since no fixed benefit is promised by the Plan, Section 4021(c)(1) does not exclude the Plan from the term "individual account plan" for the purposes of Section 4021(b)(1).

CONCLUSION

The Pension Plan of the Operating Engineers Pension Trust is an "individual account plan" or "defined contribution plan" as defined in Paragraph (34) of Section 3 of

the Act for purposes of Section 4021(b)(1) of the Act and is, therefore, excluded from coverage by the plan termination insurance provisions of the Act.

The Trustees respectfully request your written determination of this inquiry. In the event any determination contrary to the above conclusion is tentatively foreseen, we respectfully request an opportunity for an informal conference to discuss the related criteria for determining this matter. Please direct your response to the undersigned at the letterhead address given above.

Very truly yours,

WAYNE JETT

EXHIBIT B

PENSION BENEFIT GUARANTY CORPORATION
P.O. Box 7119
Washington, D.C. 20044

May 21, 1975

WAYNE JETT, ESQ.
Wilshire Centre
Suite 420
3055 Wilshire Boulevard
Los Angeles, California 90010

Dear Wayne:

This is in response to your letter of April 10, 1975 requesting a determination of "whether the Pension Plan of the Operating Engineers Pension Trust is an 'individual account plan' ('defined contribution plan') or a 'defined benefit plan' for the purposes of Section 4021(b)(1) of the Employee Retirement Income Security Act of 1974 ('the Act')."

As a result of our telephone conversation on Friday, May 9, 1975, the legal staff of the Pension Benefit Guaranty Corporation ("PBGC") reexamined the case file and an opinion was also obtained from the PBGC Office of Program and Policy Development. On the basis of the documents submitted by you it appears that the Operating Engineers Pension Trust is a defined benefit plan for the purposes of Section 4021(b)(1).

As you know, Section 4021(b) provides that:

> "This Section does not apply to any plan — (1) which is an individual account plan, as defined in paragraph (34) of Section 3 of this Act . . . ."

Paragraph (34) of Section 3 of the Act provides:

> "The term 'individual account plan' or 'defined contribution plan' means a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, an any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account."

The definition set forth in Section 3(34) is limited by Section 4021(c)(1) which provides:

> "For the purposes of subsection (b)(1), the term 'individual account plan' does not include a plan under which a fixed benefit is promised if the employer or his representative participated in the determination of that benefit."

Section III of the Pension Plan sets forth various "pension factors" which are utilized to determine the amount of the monthly benefit a retiree is to receive. In your letter of April 10, 1975 (p. 5) you stated that benefits are determined in the following fashion:

> "The retirement benefits payable are based directly upon the exact number of hours worked by the individual participant under the Plan and the applicable rate of contributions as reflected in his accumulated Pension Credits, as well as Prior Service Credits. For example, a participant who qualifies for Normal Retirement on April 1, 1975, with 23.317 Pension Credits and 10.5 Prior Service Credits would be entitled to a monthly pension for the remainder of his life equal to 23.317 times $15.50 plus 10.5 times $8.00 or a total of $445.00 per month."

This method of computing a participant's pension benefit appears to be a formula based on service and thereby is

within the class of plans we call defined benefit plans, rather than an individual account plan. (See also Section 4021(c)(1) of the Act.)

I hope this information proves helpful to you and will be of assistance in future evaluations of your Pension Plan. If you would like to discuss the matter further, either by telephone or in person, I would be glad to do so.

Sincerely,

HENRY ROSE
General Counsel

ANSWER TO COMPLAINT FOR DECLARATORY JUDGMENT, DAMAGES, INJUNCTIONS

[Filed Sep. 2, 1975.]

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

No. 75 2037 DWW

JOHN L. CONNOLLY, C. V. HOLDER, HOWARD C. DENNIS, JOHN C. MAXWELL, JAMES J. KIRST, C. WILLIAM BURKE, KENNETH J. BOURGUIGNON, JOSEPH H. SEYMOUR, RICHARD L. CORBIT, HAROLD EDWARDS, DONALD E. MIER, WILLIAM C. WAGGONER, RICHARD GANNON and ALFRED HARRISON, each in his respective capacity as Trustee of the Operating Engineers Pension Trust,

Plaintiffs,

vs.

PENSION BENEFIT GUARANTY CORPORATION, a non-profit corporation established within the Department of Labor of the United States of America,

Defendant.

Comes now, Defendant, Pension Benefit Guaranty Corporation, by its attorneys, and files this answer to the Complaint in this proceeding.

1. Defendant admits the allegations in paragraph (1) of the Complaint.

2. Defendant has no knowledge of and therefore denies the allegations of paragraph (2) of the Complaint.

3. Defendant has no knowledge of and therefore denies the allegations of paragraph (3) of the Complaint.

4. Defendant admits the allegations in paragraph (4) of the Complaint.

5. Defendant has no knowledge of and therefore denies the allegations in paragraph (5) of the Complaint.

6. Defendant has no knowledge of and therefore denies the allegation in paragraph (6) of the Complaint.

7. Defendant has no knowledge of and therefore denies the allegation in paragraph (7) of the Complaint.

8. Defendant admits that there is excluded from the coverage of Section 4021 of the Employee Retirement Income Security Act of 1974 (hereinafter the "Act") "... any plan — (1) which is an individual account plan as defined in paragraph (34) of Section 3 of [the] ... Act ...", but denies the remaining allegations in paragraph (8) of the Complaint.

9. Defendant denies the allegations in paragraph (9) of the Complaint.

10. Defendant admits that Exhibit A to the Complaint is a true copy of a letter received by Defendant but denies the remaining allegations of paragraph (10) of the Complaint.

11. Defendant admits that Exhibit B to the Complaint is a true copy of a letter from Defendant's General Counsel to Wayne Jett, Esq. but denies the remaining allegations of paragraph (11) of the Complaint.

12. Defendant admits that Plaintiff trustees have paid to Defendant the sum of $12,043.00, purportedly in compliance with Section 4007(a) of the Act, but denies the remaining allegations of paragraph (12) of the Complaint.

13. Defendant denies the allegation of paragraph (13) of the Complaint.

14. Defendant denies the allegations in paragraph (14) of the Complaint.

15. Defendant denies the allegations in paragraph (15) of the Complaint.

Further answering, Defendant alleges as follows:

1. The Complaint fails to state a claim for which relief may be granted.

2. Insofar as plaintiffs seek relief for an alleged infringement of their constitutional rights, this suit is premature.

3. Plaintiff has failed to join a party indispensible under Rule 19.

4. The relief sought by Plaintiff cannot be granted because Plaintiff has failed to comply with 28 U.S.C. §§ 2282 and 2284.

5. This Court lacks jurisdiction to decide the constitutional issues sought to be raised in this action.

6. In doing the acts complained of in the complaint, Defendant was duly authorized by and acted under the authority of Title IV of the Employee Retirement Income Security Act of 1974, specifically Section 4021 of the Act, 29 U.S.C. § 1321.

WHEREFORE, Defendant demands judgment in its favor and requests this Court to grant to Defendant such relief as may be meet and proper in the circumstances including but not limited to an award of the costs of this litigation pursuant to Section 4003(e)(5) of the Act, 29 U.S.C. § 1303(e)(5).

Respectfully submitted,

HENRY ROSE
General Counsel

GEORGE B. DRIESEN
Deputy General Counsel

BARBARA S. GUTMANN
Staff Attorney

Attorneys for Defendant,
Pension Benefit Guaranty
Corporation
8701 Georgia Avenue
Silver Springs, Maryland 20910
(301) 427-8112

STIPULATION RE MOTION FOR SUMMARY JUDGMENT

[Filed Dec. 5, 1975.]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NO. 75 2037 DWW

JOHN L. CONNOLLY, C.V. HOLDER, HOWARD C. DENNIS, JOHN C. MAXWELL, JAMES J. KIRST, C. WILLIAM BURKE, KENNETH J. BOURGUIGNON, JOSEPH H. SEYMOUR, RICHARD L. CORBIT, HAROLD EDWARDS, DONALD E. MIER, WILLIAM C. WAGGONER, RICHARD GANNON and ALFRED HARRISON, each in his respective capacity as Trustee of the Operating Engineers Pension Trust,

Plaintiffs,

vs.

PENSION BENEFIT GUARANTY CORPORATION, a non-profit corporation established within the Department of Labor of the United States of America,

Defendant.

IT IS HEREBY STIPULATED by and between the plaintiffs and defendant, each through its respective counsel, as follows:

1. This court has jurisdiction under § 4003(f) of the Employee Retirement Income Security Act of 1974 [29 U.S.C. § 1303(f)] (hereinafter called the "Act").

2. Plaintiffs JOHN L. CONNOLLY, C.V. HOLDER, HOWARD C. DENNIS, JOHN C. MAXWELL, JAMES J. KIRST, C. WILLIAM BURKE, KENNETH J. BOURGUIGNON, JOSEPH H. SEYMOUR, RICHARD L. CORBIT, HAROLD EDWARDS, DONALD E.

MIER, WILLIAM C. WAGGONER, RICHARD GANNON and JERRY TRENT, as successor of ALFRED HARRISON (herein called the "Trustees") are trustees and together constitute the Board of Trustees of the Operating Engineers Pension Trust (herein called the "Trust"), and bring this action in their official capacities as such.

3. The Trust is a joint labor-management trust created and existing in conformance with §302(c)(5) of the Labor-Management Relations Act of 1947, as amended in 1959 [29 U.S.C. §186(c)(5)]. The principal office of the Trust is located in the County of Los Angeles, State of California.

4. Defendant Pension Benefit Guaranty Corporation (herein called "PBGC") is a non-profit government owned corporation established by §4002 of the Act [29 U.S.C. §1302].

5. A written Agreement Establishing the Operating Engineers Pension Trust (herein called the "Trust Agreement") was executed on or about December 13, 1960, by Associated General Contractors of California, Inc., successor to Associated General contractors of America, Southern California Chapter; Building Industry Association of California, Inc., successor to Building Contractors Association of California, Inc., and Home Builders Association of Los Angeles, Orange and Ventura Counties, Engineering and Grading Contractors Association, Inc., successor to Home Builders Institute Inc.; Associated General Contractors of America, San Diego Chapter; San Diego Building Contractors Association, Engineering and Grading Contractors Association, Inc., San Diego Chapter; Associated General Contractors of America, Nevada Chapter; Las Vegas Builders Exchange; Southern Nevada

Home Builders, Inc.; and Federated Employers of Nevada, Inc. (herein called the "Employers") and the International Union of Operating Engineers, Local Union No. 12, (herein called the "Union").

6. Each collective bargaining agreement between the Union and the Employers at all relevant times since the establishment of the Trust has bound the Employers to abide by the Trust Agreement and to pay a stated amount to the Trust with respect to each hour worked by (or paid) each employee covered by the collective bargaining agreement.

7. At all relevant times the Trust Agreement has contained a provision in Article II, Section 7, thereof as follows:

> "Neither the Employers not any Signatory Association, or officer, agent, employee or committee member of the Employers or any Signatory Association, shall be liable to make Contributions to the Fund or be under any other liability to the Fund or with respect to the Pension Plan, except to the extent that he or it may be an Individual Employer required to make Contributions to the Fund with respect to his or its own individual or joint venture operations, or to the extent he or it may incur liability as a Trustee as hereinafter provided. Except as provided in Article III hereof, the liability of any Individual Employer to the Fund, or with respect to the Pension Plan, shall be limited to the payments required by the Collective Bargaining Agreements with respect to his or its individual or joint venture operations, and in no event shall he or it be liable or responsible for any portion of the Contributions due from other Individual Employers or with respect to the operations of such Individual Employers. The Individual Employers shall not be required to make any further

> payments or Contributions to the cost of operations of the Fund or of the Pension Plan, except as may be hereinafter provided in the Collective Bargaining Agreements."

A true copy of the Trust Agreement is attached hereto as Exhibit "A" and by reference incorporated herein.

8. The Pension Plan (herein called the "Plan") of the Trust is an appendix of the Trust Agreement. A true copy of the Plan is attached hereto as Exhibit "B" and by reference incorporated herein.

9. The Plan is an "employee pension benefit plan" within the meaning of §3(2) of the Act [29 U.S.C. §1002(2)], which has been determined by the Secretary of the Treasury to be a plan described in §401(a) of the Internal Revenue Code of 1954 (hereinafter called the "Code") in a letter dated February 7, 1975. A true copy of said letter is attached hereto as Exhibit "C" and by reference incorporated herein.

10. The Trust Agreement in Article V, Section 2, provides that "The Board of Trustees shall have the power to administer the Fund and to administer and maintain the Pension Plan . . . ." Pursuant to Section 3(16) [29 U.S.C. §1002(16)] of the Act the Board of Trustees is the Plan Administrator.

11. At all relevant times the Plan has contained a provision in Article VII, Section 4 thereof, as follows:

> "This Pension Plan has been adopted on the basis of an actuarial calculation which has established, to the extent possible, that the contributions will, if continued, be sufficient to maintain the Plan on a permanent basis. However, it is recognized that the benefits provided by this Pension Plan can be paid only to the extent that the Plan has available adequate resources for those payments. No Individual Employer has any

liability, directly or indirectly to provide the benefits established by this Plan beyond the obligation of the Individual Employer to make contributions as stipulated in any Collective Bargaining Agreement. In the event that at any time the Pension Fund does not have sufficient assets to permit continued payments under this Pension Plan, nothing contained in this Pension Plan and the Trust Agreement shall be construed as obligating any Individual Employer to make benefit payments or contributions (other than the contributions for which the Individual Employer may be obligated by any Collective Bargaining Agreement) in order to provide for the benefits established by the Pension Plan. Likewise, there shall be no liability upon the Board of Trustees, individually or collectively, or upon the Employers, Signatory Association, Individual Employer, or Union to provide the benefits established by this Plan if the Pension Fund does not have the assets to make such benefit payments."

12. At all relevant times the Plan has contained a provision in Article VIII, Section 2, thereof as follows:

"This Plan has been adopted on the basis of an actuarial estimate which has established (to the fullest extent possible) that the income and accruals of the Fund will be fully sufficient to support this benefit plan on a permanent basis. However, it is recognized as possible that in the future the income or the liabilities of the Fund may be substantially different from those previously anticipated. It is understood that this Pension Plan can be fulfilled only to the extent that the Fund has assets available from which to make payments. Consequently, the Board of Trustees may have prepared annually an Annual Actuarial Evaluation of the Fund and shall

take the actuarial status of the Fund into account in determining amendment or modification of this Pension Plan."

13. At all relevant times the Plan has contained a provision in Article III, Section 1, thereof as follows:

"(b) Amount of Normal Pension

The monthly amount of the Normal Pension payable to a Participant who is eligible for a pension in accordance with Section 1(a) of this Article shall be determined by multiplying the numbers (including fractions) of his respective Prior Service Credits and Pension Credits accumulated before his retirement by the appropriate Pension Factor below, unless the Participant's Normal Pension is to be determined in accordance with Section 5 of Article II in which event the provision of that Section shall control:

	Pension Factor
(1) Effective on July 1, 1966:	
Prior Service Credit (per year)	$4.50
Pension Credit (per credit)	3.65

The above Pension Factors will apply to both Participants and Retired Participants on the pension rolls on July 1, 1966.

(2) Effective on July 1, 1967:	
Prior Service Credit (per year)	$7.20
Pension Credit (per credit)	5.65

The above Pension Factors will apply to both Participants and Retired Participants on the pension rolls on July 1, 1967.

(3) Effective on July 1, 1968:	
Prior Service Credit (per year)	$7.20
Pension Credit (per credit)	7.95

The above Pension Factors will apply to both Participants and Retired Participants on the pension rolls on July 1, 1968.

(4) Effective on July 1, 1970:

Prior Service Credit (per year)	$ 7.20
Pension Credit (per credit)	9.00

The above Pension Factors will apply to both Participants and Retired Participants on the pension rolls on July 1, 1970.

(5) Effective on July 1, 1971:

Prior Service Credit (per year)	$ 7.20
Pension Credit (per credit)	11.00

The above Pension Factors will apply to both Participants and Retired Participants on the pension rolls on July 1, 1971.

(6) Effective on September 1, 1972:

Prior Service Credit (per year)	$ 8.00
Pension Credit (per credit)	12.00

The above Pension Factors will apply to both Participants and Retired Participants on the pension rolls on September 1, 1972.

(7) Effective on July 1, 1973:

Prior Service Credit (per year)	$ 8.00
Pension Credit (per credit)	15.50

The above Pension Factors will apply to both Participants and Retired Participants on the pension rolls on July 1, 1973.

(8) Effective on July 1, 1975:

Prior Service Credit (per year)	$ 8.00
Pension Credit (per credit)	20.00

The above Pension Factors will apply to both Participants and Retired Participants but not to surviving spouses or beneficiaries on the pension rolls on July 1, 1975."

14. At all relevant times the Plan has provided in Article II, Section 2(a), that when a participant is entitled to Prior Service Credits, such participant is:

"(i) . . . entitled to a full year of such credit for each Plan Year he was so employed for 1200 hours or more and if so employed for less than 1200 hours he shall receive 1/1200th of a year for each such hour."

15. At all relevant times the Plan has provided in Article II, Section 3 as follows:

"(a) For employment commencing on and after July 1, 1960, but prior to July 1, 1968, a Participant will receive one Pension Credit for each 1000 hours, and 1/1000th of a Pension Credit for each hour less than a full Pension Credit in which he is employed by an Individual Employer with regard to which contributions are received by the Fund, or are obligated to be paid to the Fund, subject to the provisions of Article V, Section 4.

(b) For employment commencing on and after June 1, 1968, but prior to July 1, 1970, a Participant will receive one Pension Credit for each $600 of contributions made on his behalf and 1/1000th of a Pension Credit for each 60¢ accumulation less than a full Pension Credit for which he is employed by an Individual Employer with regard to which contributions are received by the Fund or obligated to be paid to the Fund, subject to the provisions of Article V, Section 4.

(c) For employment commencing on and after July 1, 1970, but prior to July 1, 1971, a Participant will

receive one Pension Credit for each 0800 of contributions made on his behalf and 1/1000th of a Pension Credit for each 80¢ accumulation less than a full Pension Credit for which he is employed by an Individual Employer with regard to which contributions are received by the Fund or obligated to be paid to the Fund, subject to the provisions of Article V, Section 4.

(d) For employment commencing on and after July 1, 1971, but prior to July 1, 1972, a Participant will receive one Pension Credit for each $1,000 of contributions made on his behalf and 1/1000th of a Pension Credit for each 71.00 accumulation less than a full Pension Credit for which he is employed by an Individual Employer with regard to which contributions are received by the Fund or obligated to be paid to the Fund, subject to the provisions of Article V, Section 4.

(e) For employment commencing on and after July 1, 1972, but prior to July 1, 1973, a Participant will receive one Pension Credit for each $1,200 of contributions made on his behalf and 1/1000th of a Pension Credit for each $1.20 accumulation less than a full Pension Credit for which he is employed by an Individual Employer with regard to which contributions are received by the Fund or obligated to be paid to the Fund, subject to the provisions of Article V, Section 4.

(f) For employment commencing on and after July 1, 1973, a Participant will receive one Pension Credit for each $1,500 of contributions made on his behalf and 1/1000th of a Pension Credit for each $1.50 accumulation less than a full Pension Credit for which he is employed by an Individual Employer with regard to which contributions are received by the

Fund or obligated to be paid to the Fund, subject to the provisions of Article V, Section 4."

16. At all relevant times the Plan has been and is a plan:

(A) to which more than one employer is required to contribute,

(B) which is maintained pursuant to a collective-bargaining agreement between employee representatives and more than one employer, and

(C) under which the amount of contributions made under the plan for a plan year by each employer making such contributions is less than 50 percent of the aggregate amount of contributions made under the plan for that plan year, by all employers making such contributions.

17. The Plan currently provides for a benefit of eight ($8.00) dollars for each Prior Service Credit and for a benefit of twenty ($20.00) dollars for each Pension Credit accumulated by each Plan participant and each retired participant.

In order to ascertain the benefit entitlement of a participant, a computerized account of the necessary information is maintained by the Trustees for each Plan participant. Each month the Trustees record the number of hours (including fractions) worked by a participant during the preceding month. In addition, the hourly rate at which an employer is obligated to contribute to the Pension Fund and the amount that an employer is obligated to contribute on behalf of an individual participant for the preceding month is also recorded. The Pension Credits earned by an individual for the preceding month are also recorded.

18. A computer print-out of the information maintained on behalf of each participant shows the number of hours worked each month by an individual, the obligated monthly contribution to be made on behalf of an individual and the monthly accrual of an individual's Pension Credits. These monthly entries are aggregated and presented as yearly totals at the end of each June. It is not possible to determine the amount actually contributed on behalf of an individual participant from the computer print-out of the information maintained for each participant. No other information for the purpose of determining the amount of the pension benefit payable to an individual participant except for identifying information is maintained on an individual participant or is shown on the computer print-out. A sample computer print-out evidencing the information kept for one individual participant in the Plan is attached hereto as Exhibit "D" and by reference incorporated herein.

19. Upon retirement a participant applies to the Trustees for his pension benefit by submitting a Pension Application. A copy of a Pension Application is attached hereto as Exhibit "E" and by reference incorporated herein.

20. In order to determine the benefit entitlement of a retiring participant the Trustees ascertain the number of Prior Service Credits accumulated by the participant on the basis of the Union Membership information contained in the Pension Application, Local membership records are also checked, if necessary, to determine the number of Prior Credits accumulated by a participant since Article II, Section 2(b) of the Plan has at all relevant times provided that a year's membership in good standing in the Union from the period May 1, 1939 to June 1, 1960 establishes the presumption that a participant is entitled to a year of Prior Service Credit for each year of such

Union membership, except that no participant may accumulate more than 20 such Prior Service Credits.

The number of Pension Credits accumulated by a participant is ascertained by consulting the computer printout of the information maintained on each individual. (See paragraph 18, *supra,* and Exhibit "D"). Assuming that the participant has not had a break in service, all such Pension Credits are entered in the "Work Sheet" and multiplied by the current Pension Factor. Prior Service Credits are also entered on the Work Sheet and multiplied by the current Prior Service Credit Factor. A participant's Total Pension Amount is the sum of his Pension Credits times $20.00 and his Prior Service Credits times $8.00. At no time either on the Work Sheet or on the Pension Application form is the amount actually contributed on behalf of a participant determined. A participant's benefit is paid regardless of whether the obligated contributions on his behalf are actually made, provided there are sufficient assets in the Fund.

21. The Pension Factors used to determine the benefit entitlement of Plan participants have been fixed by the Trustees from time to time. By action of the Trustees said Pension Factor was adjusted in 1966, 1967, 1968, 1970, 1971, 1972, 1973 and 1975. In setting the Pension Factor, the Trustees take into account the investment income, gains and losses, expenses, any forfeitures by participants, the mortality experience of the Plan and the actual and anticipated employer contributions and delinquencies. A copy of the actuarial recommendations included in the actuarial advice on which the 1975 Pension Factor adjustment was based is attached hereto as Exhibit "F" and by reference incorporated herein.

22. The authority of the Trustees to set benefits and Pension Factors is subject to the powers, duties and limitations of the Trustees as set forth in Article II,

Section 7 of the Trust Agreement and Article VII, Section 4 and Article VIII, Section 2 of the Pension Plan.

23. By letter dated April 10, 1975, the Trustees applied to PBGC for a determination as follows:

> "... whether the Pension Plan of the Operating Engineers Pension Trust is an 'individual account' plan ('defined contribution plan') or a 'defined benefit plan' for the purposes of Section 4021(b)(1) of the Employee Retirement Income Security Act of 1974 ('the Act') ..."

A true copy of said letter dated April 10, 1975, is attached hereto as Exhibit "G" and by reference incorporated herein.

24. By letter dated May 21, 1975, the Office of the General Counsel of the Corporation informed the Trustees as follows:

> "... On the basis of documents submitted by you it appears that the Operating Engineers Pension Trust is a defined benefit plan for the purposes of Section 4021(b)(1)."

A true copy of said letter dated May 21, 1975, is attached hereto as Exhibit "H" and by reference incorporated herein.

25. By letter dated July 8, 1975, the Trustees made demand upon PBGC for return of the sum of Twelve Thousand Forty-three Dollars ($12,043.00) which the Trustees had paid to PBGC as a termination insurance premium on or about December 1, 1974. A true copy of said letter dated July 8, 1975, is attached hereto as Exhibit "I" and by reference incorporated herein.

26. By letter dated July 30, 1975, PBGC refused to refund the aforesaid termination insurance premium paid by the Trustees on the ground that the Plan is a defined

benefit plan within the meaning of the Act. A true copy of said letter dated July 30, 1975, is attached hereto as Exhibit "J" and by reference incorporated herein.

27. An actual controversy has arisen and exists between the Trustees and the PBGC with respect to whether the Plan is a defined contribution plan or a defined benefit plan covered by the plan termination insurance provisions of the Act.

DATED: December 5, 1975 /s/ Wayne Jett
WAYNE JETT
Attorney for Plaintiffs

DATED: Nov. 17, 1975 /s/ Henry Rose
HENRY ROSE
General Counsel

/s/ George B. Driesen
GEORGE B. DRIESEN
Deputy General Counsel

/s/ Barbara S. Gutmann
BARBARA S. GUTMANN
Staff Attorney

Attorneys for Defendant

[Exhibits A-J omitted; *see* Record on Appeal.]

ORDER GRANTING SUMMARY JUDGMENT

[Filed February 12, 1976]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 75-2037-DWW

JOHN L. CONNOLLY, C. V. HOLDER, HOWARD C. DENNIS, JOHN C. MAXWELL, JAMES J. KIRST, C. WILLIAM BURKE, KENNETH J. BOURGUIGNON, JOSEPH H. SEYMOUR, RICHARD L. CORBIT, HAROLD EDWARDS, DONALD E. MIER, WILLIAM C. WAGGONER, RICHARD GANNON and ALFRED HARRISON, each in his respective capacity as Trustee of the Operating Engineers Pension Trust,

Plaintiffs,

vs.

PENSION BENEFIT GUARANTY CORPORATION, a non-profit corporation established within the Department of Labor of the United States of America,

Defendant.

The Operating Engineers Pension Trust is a joint labor-management trust created in conformance with §320(c)(5) of the Labor-Management Relations Act of 1947, as amended in 1959 (29 USC §186(c)(5)). It was created in 1960 by a written agreement to which several contractors associations and home builders associations were signatories as employers and the international union of operating engineers, local union No. 12, as the organization representing the employees. The individual plaintiffs are trustees of the trust who have the power to administer the Pension Fund and to administer and maintain the Pension Plan which is the subject of the trust. The purpose of the trust is to create a pension fund

to which a number of employers make contributions and from which employees may draw benefits when they reach a stated age of retirement.

Congress has concerned itself over the years with the problem of employee pension funds which have terminated with financial shortages resulting in an inability of many employees to receive expected benefits upon retirement. A recent Congressional effort to bring about a cure for this problem has resulted in the enactment of the Employee Retirement Income Security Act of 1974 (ERISA). Generally, this act seeks to protect the well-being and security of the millions of employees and their dependents who are affected by benefit plans. It seeks to set safeguards for the operation of plans and to establish standards for the administration of pensions in order to minimize terminations of plans and losses to beneficiaries. Section 4002 of the Act establishes within the Department of Labor a corporate body to be known as the Pension Benefit Guaranty Corporation and its purpose is to encourage the continuation and maintenance of voluntary private pension plans so as to provide for timely and uninterrupted payment of benefits to participants. Section 4005 of the Act establishes four revolving funds which are intended to serve as insurance against the failure of the particular types of pension funds which this part of ERISA is designed to cover. The corporation is empowered to prescribe insurance premium rates which it assesses against certain employers to guarantee that the pension funds created by those employers will not suffer short-fall. In the event of a termination of a pension plan of this type, the employer could be held liable for shortages in the fund up to 30% of the net worth of the employer's business. 29 USC 1362(a) and (b). Not all types of pension plans are intended to be covered under the insurance provisions of ERISA. Section 4021(b) of the Act provides as follows:

> "(b) This section does not apply to any plan — (1) which is an individual account plan, as defined in paragraph (34) of Section 1002 of this title."

Paragraph (34) of Section 3 of the Act provides as follows:

> "The term 'individual account plan' or 'defined contribution plan' menas a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, any any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account."

Also, Section 4021(c)(1) of the Act provides as follows:

"For purposes of subsection (b)(1), the term 'individual account plan' does not include a plan under which a fixed benefit is promised if the employer or his representative participated in the determination of that benefit."

Plaintiff trustees administer a pension fund for the benefit of employees within the building industry. Defendant Pension Benefit Guaranty Corporation has taken the position that the type of pension administered by plaintiff trustees is covered by the insurance provisions of ERISA and the corporation compelled plaintiff trustees to pay a premium of $12,043 into its guaranty fund. The plaintiffs contend that their pension fund comes within the exceptions set forth in paragraph (34) of Section 3 of the Act and that they are not covered by the insurance provisions. If plaintiffs' fund is not included within the exceptions just noted, the trustees would also be limited by provisions of ERISA as to the manner in which they could administer the fund over which they are trustees. Additionally, employers who contribute to plaintiffs' fund

would be subject to the liability provisions of ERISA in the event of a termination of the plan.

In short, plaintiff contends that its plan is an "individual account plan" or "defined contribution plan" as referred to in 29 USC § 1002(34) while the defendant corporation contends that plaintiffs' plan is a "defined benefit plan" as defined in Section 1002(35) and is therefore covered. Plaintiffs' trustees communicated their objections to the defendant corporation upon being required to pay premiums into the corporation's Guaranty Fund, but defendants legal staff concluded that the Operating Engineers Pension Trust is a Defined Benefit Plan for the purposes of Section 4021(b)(1) because plaintiffs' method of computing a participant's pension benefit appeared to be formula based on service and therefore within the class of plans called defined benefit plans rather than an individual account plan. In this litigation, which seeks to have this Court determine whether plaintiffs' plan comes within the exceptions of Section 4021(b), the defendant urges that since it is the agency charged with enforcing ERISA, its determination of coverage should be given more weight than that reached by plaintiff trustees. *Griggs v. Duke Power Co.*, 401 U.S. 424, 434 (1971).

AGREEMENT ESTABLISHING THE OPERATING ENGINEER'S PENSION TRUST

The 1960 agreement which established the trust administered by plaintiffs (hereinafter called the "Trust Agreement") provided that each collective bargaining agreement between the union and the employers would bind the employers to abide by the Trust Agreement and to pay a stated amount into the trust with respect to each hour worked by each employee covered by the collective bargaining agreement. Article II, Section 7 of the Trust Agreement provides as follows:

"Neither the Employers nor any Signatory Association or officer, agent, employee or committee member of the Employers or any Signatory Association, shall be liable to make Contributions to the Fund or be under any other liability to the Fund or with respect to the Pension Plan, except to the extent that he or it may be an Individual Employer required to make contributions to the Fund with respect to his or its own individual or joint venture operations, or to the extent he or it may incur liability as a Trustee as hereinafter provided. Except as provided in Article III hereof, the liability of any Individual Employer to the Fund, or with respect to the Pension Plan, shall be limited to the payments required by the Collective Bargaining Agreements with respect to his or its individual or joint venture operations, and in no event shall he or it be liable or responsible for any portion of the Contributions due from other Individual Employers or with respect to the operations of such Individual Employers. The Individual Employers shall not be required to make any further payments or Contributions to the cost of operations of the Fund or of the Pension Plan, except as may be hereinafter provided in the Collective Bargaining Agreements."

Article VII, Section 4 of the Plan provides as follows:

"This Pension Plan has been adopted on the basis of an actuarial calculation which has established, to the extent possible, that the contributions will, if continued, be sufficient to maintain the Plan on a permanent basis. However, it is recognized that the benefits provided by this Pension Plan can be paid only to the extent that the Plan has available adequate resources for those payments. No Individual Employer has any liability, directly or indirectly to provide the benefits

established by this Plan beyond the obligation of the Individual Employer to make contributions as stipulated in any Collective Bargaining Agreement. In the event that at any time the Pension Fund does not have sufficient assets to permit continued payments under this Pension Plan, nothing contained in this Pension Plan and the Trust Agreement shall be construed as obligating any Individual Employer to make benefit payments or contributions (other than the contributions for which the Individual Employer may be obligated by any Collective Bargaining Agreement) in order to provide for the benefits established by the Pension Plan. Likewise, there shall be no liability upon the Board of Trustees, individually or collectively, or upon the Employers, Signatory Association, Individual Employer, or Union to provide the benefits established by this Plan if the Pension Fund does not have the assets to make such benefit payments."

Article VIII, Section 2 of the Plan provides:

"This Plan has been adopted on the basis of an actuarial estimate which has established (to the fullest extent possible) that the income and accruals of the Fund will be fully sufficient to support his benefit plan on a permanent basis. However, it is recognized as possible that in the future the income or the liabilities of the Fund may be substantially different from those previously anticipated. It is understood that this Pension Plan can be fulfilled only to the extent that the Fund has assets available from which to make payments. Consequently, the Board of Trustees may have prepared annually an Annual Actuarial Evaluation of the Fund and shall take the actuarial status of the Fund into account in determining amendment or modification of this Pension Plan."

FORMULA FOR FIXING PENSION AMOUNT

The monthly amount of the pension payable to a participant who is eligible for a pension in plaintiffs' plan is determined by multiplying the numbers of his respective Prior Service Credits and Pension Credits accumulated by the appropriate Pension Factor. The Plan provides for some participants to be entitled to Prior Service Credits. It also provides for certain participants to receive Pension Credits pursuant to a prescribed formula. The Pension Factor used to determine the benefit entitlement of participants is fixed from time to time. In setting the Pension Factor, the trustees take into account the investment income, gains and losses, expenses, any forfeitures by participants, the mortality experience of the Plan and the actual anticipated employer contributions and delinquencies.

EMPLOYER CONTRIBUTIONS

Under the Pension Trust created by its signatories in 1960 the various employers would enter into collective bargaining agreements from time to time with the union. As a part of the terms of that agreement the employer obligated himself to make certain contributions into the trust fund for each of his employees, measured by the number of hours worked and any Prior Service Credits or Pension Credits to which the employee would be entitled. The amount the employer is obligated to contribute to the fund may change from time to time. This comes about because the trustees of the Plan are authorized annually to have prepared an actuarial evaluation of the fund which shall consider the actuarial status of the fund and this is taken into account in determining which amendments or modifications shall be made to the Pension Plan. If it appears from the actuarial report that the fund is in peril, the trustees have the power at a given period to compel

such additional contributions into the fund from the employers as should preserve the integrity of the fund.

By its terms as quoted hereinbefore, the Plan assures the employer that his sole obligation to the fund is to pay such contributions for each employee as from time to time the plaintiff trustees shall determine is appropriate. The agreement states in clear and concise language not subject to any ambiguity that the employers obligation to the employee for pension benefits is ended when he pays the appropriate contribution into the fund. In no way does the employer under the structure of this agreement promise the employee a defined pension benefit. Rather it is clear that he only promises that he will pay into the fund each pay period the contribution that is prescribed by the trustees and that his obligation to the fund is then ended.

In negotiating a collective bargaining agreement there is the possibility that a union could make a demand upon an employer to extend to the employee a defined pension benefit, but such has not been done in the contract under review. In the negotiations that attended this agreement the employer demanded that his obligation be ended once he made a contribution to the individual account of the employee and the union accepted the provision. To interpret this carefully constructed agreement as not coming within the exceptions of Section 1002(34) is to force upon the employer a greater obligation and liability than he had agreed to in his contract.

Defendant argues strenuously that plaintiffs' plan is covered by the insurance provisions of ERISA because it is not a true "individual account plan" as defined by Section 1002(34). That section defines an individual account plan as a plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account and any income, expenses, gains and losses, and any

forfeitures of accounts of other participants which may be allocated to such participant's account. Defendant states that because the contributions of the employer to the individual's account is not maintained precisely like the concept of one's savings account in a bank, but instead the money is pooled by the trustees for investment purposes, and because of the computerized method employed by the trustees in reckoning the accumulated amounts contributed to the individual's account from time to time, this destroys proper characterization of the plan as an "individual account plan" or "defined contribution plan." The legislation which must guide the consideration of this dispute is lengthy and complex and represents draftsmanship that is confusing, to say the least, but a fair reading of the Act and the legislative history which preceded the enactment leads me to conclude that the structure of plaintiffs' plan properly comes within the exceptions of Section 1002 and should be characterized as an individual account plan.

Defendant claims that plaintiffs' plan does not come within Section 1002(34) because an "individual account plan" is one which provides for an individual account for each participant and for benefits based *solely* upon the amount contributed to the participant's account, and any income, expenses, gains or losses, and any forfeitures of accounts of other participants which may be allocated to each participant's account. Defendant argues that in the instant plan, benefits are not based solely upon the amount contributed to each participant's account because a part of the retirement benefit is based on past service. The parties stipulate that a participant is entitled to a pension benefit which is determined by multiplying his "Prior Service Credits" by the current "Pension Factor." An employee earns one Prior Service Credit (up to 20) for each year of covered service in the industry prior to the establishment of the plan by the 1960 agreement.

Moreover, defendant argues, the plan provides for a monthly benefit determined by multiplying each "Pension Credit" by the appropriate "Pension Factor." A "Pension Credit" is earned whenever a participant works a given number of hours. The retirement benefits payable to a participant are based directly upon the number of hours worked by the employee and the applicable rate of contributions as reflected in his accumulated Pension Credits, as well as Prior Service Credits.

Moreover, PBGC argues that there is another reason for concluding plaintiffs' plan to be a covered plan. Section 4021(c)(1) of the Act, 29 USC § 1321(c)(1) provides as follows:

> "For purposes of subsection (b)(1) of this section, the term "individual account plan" does not include a plan under which a fixed benefit is promised if the employer or his representative participated in the determination of that benefit."

Defendant argues that employer representatives participated in the determination of the benefit in plaintiffs' plan.

As I see it, the employer is signatory to an agreement which sets up a joint labor-management trust which has a Board of Trustees. The Trust binds the employer to pay a stated amount to the Trust for each employee covered by the collective bargaining agreement. The trustees are the ones who make a determination of the benefits, and this scheme includes no such participation on the part of the employer as is intended in Section 4021(c)(1) of the Act.

I conclude that plaintiffs' plan is a defined contribution plan under which no fixed benefit is promised; that it comes within the exception stated in 29 USC § 1321(b)(1) and that plaintiffs are entitled to summary judgment. The Court further finds that defendant should

be required to return to plaintiff the sum of $12,043 plus interest thereon from the date said sum was paid to defendant and that defendant, its agents, employees and representatives are enjoined from acting in any manner inconsistent with the judgment of this Court as set forth in this memorandum which, pursuant to Rule 52(a) FRCP shall take the place of findings of fact and conclusions of law.

DATED: This 12th day of February, 1976.

/s/ David W. Williams,
DAVID W. WILLIAMS,
United States District
Judge

SUMMARY JUDGMENT FOR PLAINTIFFS JOHN L. CONNOLLY, ET AL.

[Filed February 18, 1976.]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 75-2037-DWW

JOHN L. CONNOLLY, et al., etc.,
Plaintiffs,
vs.
PENSION BENEFIT GUARANTY CORPORATION, etc.,
Defendant.

The motion of plaintiffs John L. Connolly, et al., for summary judgment having come on regularly for hearing on 1976, in the above-entitled Court, the Honorable David W. Williams, Judge, presiding, plaintiffs having appeared through their attorney of record, Wayne Jett, and defendant having appeared through its attorneys of record, Henry Rose, General Counsel, George B. Driesen, Deputy General Counsel, and Barbara Gutmann, Staff Attorney, and the Court having considered all the pleadings and the stipulations which have been filed, and the oral arguments of counsel, and having considered the law and having found that there is no genuine issue of fact to be submitted for trial and having concluded that plaintiffs are entitled to judgment as a matter of law, and the Court having made and caused to be filed its written findings of fact and conclusions of law,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that summary judgment in favor of plaintiffs and against defendant be, and it hereby is, granted, and that plaintiffs recover from defendant the total sum of $12,043.00 paid by plaintiffs to defendant on or about December 1, 1974, together with interest thereon at the

rate of seven percent (7%) per annum from said date until paid. In addition thereto, plaintiffs shall recover such additional amounts as may be shown to have been paid by plaintiffs to defendant subsequent to the filing of plaintiffs' motion for summary judgment herein, together with its reasonable attorneys' fees and cost of suit incurred herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Pension Plan of the Operating Engineers Pension Trust is a defined contribution plan within the meaning of 29 U.S.C. § 1002(34) which does not promise a fixed benefit within the meaning of 29 U.S.C. § 1321(c)(1) and which is not a plan covered by the plan termination insurance provisions of the Employee Retirement Income Security Act of 1974 [29 U.S.C. §§ 1301-1381].

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that a permanent injunction be, and it hereby is, granted to restrain defendant, its agents, employees, representatives and all persons in concert with them from acting in any manner inconsistent with the judgment of this Court to interfere with the rights of plaintiffs, their agents, employees, representatives and successors, as found, concluded and declared by this Court.

DATED: Feb. 18, 1976

/s/ David W. Williams

DAVID W. WILLIAMS,
United States District
Judge

ORDER RE THREE-JUDGE COURT

[Filed Sept. 13, 1979.]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NO. CV 75-2037-DWW

JOHN L. CONNOLLY, et al., etc.
Plaintiffs,

vs.

PENSION BENEFIT GUARANTY CORPORATION,
Defendant.

Plaintiffs, trustees of the Operating Engineers Pension Trust, move for convocation of a three-judge court to hear its constitutional claim that regulations of the Pension Benefit Guaranty Corporation infringe upon their right to contact and deprive them of property without due process. The case, filed in 1975, predates Public Law 94-381, 90 Stat. 1119, which amended the provisions for a pre-judge court. However, Section 7 of that enactment specifically makes that Act not applicable to actions commenced before the enactment. The case is before this court on remand from the Court of Appeals, which had reversed this court's ruling based upon its construction of the statute. This court had agreed with the Trustees that their pension plan was excluded from the scope of the regulations complained of which plaintiffs complain.

Trustees assert that because they must make certain additional payments under ERISA beyond their contractual provision, that their right to contract has been infringed, and that there is a due process violation. This court considers the question, and has determined that as a matter of law there is no substantial constitutional question raised warranting the convening of a three-judge

court. The Court of Appeals made clear in its order of reversal and remand that the pension plan at issue fell under the provisions of ERISA. As a qualified pension plan under ERISA, the plan is a beneficiary of the tax benefits provided by the law, as well as being required to conform to the complained-of regulations issued by the agency entrusted with administration of provisions of ERISA. The Supreme Court has made clear that in claims of infringement of the constitutional right to contract and of a deprivation of property without due process, a party must accept the responsibilities imposed by a governmental scheme as part of its distribution of benefits, absent other due process violations. *Fahey v. Mallonee*, 332 U.S. 245 (1947). There is no allegation that the regulations about which plaintiffs complain were adopted in a manner contrary to due process or other rule-making requirements.

This Court may decline to certify the need to convene a three-judge court when the constitutional question presented is insubstantial. I therefore decline to do so.

IT IS SO ORDERED.

DATED: This 13th day of September, 1979.

/s/ David W. Williams

DAVID W. WILLIAMS,
United States District
Court

FINDINGS OF FACT AND CONCLUSIONS OF LAW

[Filed Mar. 24, 1981.]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NO. CV 75-2037-DWW

JOHN L. CONNOLLY, et al., etc.
Plaintiffs,

vs.

PENSION BENEFIT GUARANTY CORPORATION,
Defendant.

The motion of defendant Pension Benefit Guaranty Corporation for summary judgment having come before the Court, the Honorable David W. Williams presiding, and the cause having been submitted for a decision, and an Order having been made granting defendant's motion for summary judgment and directing that judgment be entered for defendant Pension Benefit Guaranty Corporation, the Court now makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Plaintiffs John L. Connolly, et al., are trustees and together constitute the Board of Trustees of the Operating Engineers Pension Trust and bring this action in their official capacities as such. A true and correct copy of the Agreement Establishing the Operating Engineers Pension Trust (hereinafter the "Trust Agreement") is attached as Exhibit A to the Stipulation re Motion for Summary Judgment filed in this action by agreement of the parties.

2. Defendant Pension Benefit Guaranty Corporation is a non-profit, wholly federally owned, government corporation established by Section 4002 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. Section 1302.

3. A true and correct copy of the Pension Plan established pursuant to the Trust Agreement (hereinafter "Plan") is attached as Exhibit B to the Stipulation re Motion for Summary Judgment filed in this action by agreement of the parties.

4. In the Stipulation re Motion for Summary Judgment, the parties have agreed as follows:

At all relevant times, the Plan has been and is a plan:

(A) to which more than one employer is required to contribute,

(B) which is maintained pursuant to a collective-bargaining agreement between employee representatives and more than one employer,

(C) under which the amount of contribution made under the plan for a plan year by each employer making such contributions is less than 50 percent of the aggregate amount of contributions made under the plan for that plan year, by all employers making such contributions, and

(D) under which benefits are payable to each participant without regard to the cessation of contributions by the employer who had employed that participant except to the extent that such benefits accrued as a result of service with the employer before such employer was required to contribute to such a plan.

CONCLUSIONS OF LAW

1. The Plan is a multiemployer employee pension benefit plan within the meaning of 29 U.S.C. Sections 1002(2) and 1301(3).

2. Plaintiff's Complaint does not raise any substantial constitutional question.

DATED: This 24th day of March, 1981.

/s/ DAVID W. WILLIAMS

DAVID W. WILLIAMS,
United States District Judge

ORDER GRANTING SUMMARY JUDGMENT

[Filed Mar. 24, 1981.]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 75-2037-DWW

JOHN L. CONNOLLY, et al., etc.
Plaintiffs,

vs.

PENSION BENEFIT GUARANTY CORPORATION,
Defendant.

Upon consideration of the Motion for Summary Judgment of the Pension Benefit Guaranty Corporation, it is,

ORDERED: That the Motion of the Pension Benefit Guaranty Corporation for Summary Judgment is granted and judgment is hereby entered in favor of the Pension Benefit Guaranty Corporation and against plaintiffs in their capacities as Trustees of the Operating Engineers Pension Trust.

DATED: This 24th day of March, 1981.

/s/ David W. Williams
DAVID W. WILLIAMS,
United States District
Judge

NOTIFICATION AND REQUEST FOR DESIGNATION OF THREE JUDGE COURT

28 U.S.C. § 2284

[Filed Jun. 21, 1982.]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOHN L. CONNOLLY, et al., etc.,
Plaintiffs,

vs.

PENSION BENEFIT GUARANTY CORPORATION, etc.,
Defendant.

TO: *The Honorable James R. Browning, Chief Judge, United States Court of Appeals for the Ninth Circuit.*

Pursuant to the provisions of 28 U.S.C. Section 2284, you are notified that the complaint now pending in the above cause involves, among other things, the enforcement, operation and execution of federal statutes and seeks an injunction restraining the enforcement and execution of those statutes.

This Notification and Request for Designation of Three Judge Court is made and issued pursuant to the Mandate of the United States Court of Appeals for the Ninth Circuit in this case, officially reported at 673 F.2d 1110.

IT IS ORDERED that the original of this Notification and Request be filed and that the Clerk forward true copies thereof by United States mail to Chief Judge James R. Browning and to all counsel who have appeared in this proceeding.

Dated: June 21, 1982

/s/ David W. Williams
DAVID W. WILLIAMS
United States
District Judge

FIRST AMENDED COMPLAINT FOR DECLARATORY JUDGMENT, DAMAGES, INJUNCTION
[29 U.S.C § 1303(f)]
[28 U.S.C. § 2201-2202]
[F.R.C.P. Rule 57]

[Filed Aug. 16, 1982]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
NO. 75 2037 DWW

JOHN L. CONNOLLY, C. V. HOLDER, HOWARD C. DENNIS, JOHN C. MAXWELL, JAMES J. KIRST, C. WILLIAM BURKE, KENNETH J. BOURGUIGNON, JOSEPH H. SEYMOUR, RICHARD L. CORBIT, HAROLD EDWARDS, DONALD E. MIER, WILLIAM C. WAGGONER, RICHARD GANNON and ALFRED HARRISON, each in his respective capacity as Trustee of the Operating Engineers Pension Trust,

Plaintiffs,

vs.

PENSION BENEFIT GUARANTY CORPORATION, a non-profit corporation established within the Department of Labor of the United States of America,

Defendant.

FIRST CLAIM FOR RELIEF

1. The jurisdiction of this Court is invoked under Section 4003(f) of the Employee Retirement Income Security Act of 1974 ("ERISA") [29 U.S.C. § 1303(f)] and under the Declaratory Judgment Act [28 U.S.C. §§ 2201-2202].

2. Plaintiffs JOHN L. CONNOLLY, C. V. HOLDER, HOWARD C. DENNIS, JOHN C. MAXWELL, JAMES J. KIRST, C. WILLIAM BURKE, KENNETH J.

BOURGUIGNON, JOSEPH H. SEYMOUR, RICHARD L. CORBIT, HAROLD EDWARDS, DONALD E. MIER, WILLIAM C. WAGGONER, RICHARD GANNON and ALFRED HARRISON (herein called the "Trustees") are trustees and together constitute the Board of Trustees of the Operating Engineers Pension Trust (herein called the "Trust"), and bring this action in their official capacities as such.

3. The Trust is a joint labor-management trust created and existing in conformance with Section 302(c)(5) of the Labor-Management Relations Act of 1947, as amended in 1959 [29 U.S.C. § 186(c)(5)]. The principal office of the Trust is located in the County of Los Angeles, State of California.

4. Defendant Pension Benefit Guaranty Corporation (herein called the "Corporation") is a non-profit corporation established within the Department of Labor of the United States of America by Section 4002 of ERISA [29 U.S.C. § 1302].

5. The Trustees administer a pension plan (herein called the "Plan") established pursuant to the Trust. A written Agreement Establishing the Operating Engineers Pension Trust (herein called the "Trust Agreement") was executed in 1960 by certain employers (herein called the "Employers") and the International Union of Operating Engineers, Local Union No. 12, (herein called the "Union"). At all times the Trust Agreement has contained a provision in Article II, Section 7, thereof as follows:

> "Neither the Employers nor any Signatory Association, or officer, agent, employee or committee member of the Employer or any Signatory Association, shall be liable to make Contributions to the Fund or be under any other liability to the Fund or with

respect to the Pension Plan, except to the extent that he or it may be an Individual Employer required to make Contributions to the Fund with respect to his or its own individual or joint venture operations, or to the extent he or it may incur liability as a Trustee as hereinafter provided. Except as provided in Article III hereof, the liability of any individual Employer to the Fund, or with respect to the Pension Plan, shall be limited to the payments required by the Collective Bargaining Agreements with respect to his or its individual or joint venture operations, and in no event shall he or it be liable or responsible for any portion of the Contributions due from other Individual Employers or with respect to the operations of such Individual Employers. The Individual Employers shall not be required to make any further payments or Contributions to the cost of operations of the Fund or of the Pension Plan, except as may be hereinafter provided in the Collective Bargaining Agreements."

The collective bargaining agreement between the Union and the Employers at all times has bound the Employers to abide by the Trust Agreement and to pay a stated amount to the Trust with respect to each hour worked by (or paid) each employee covered by the agreement.

6. At all times the Plan has contained a provision in Article VII, Section 4 thereof, as follows:

"This Pension Plan has been adopted on the basis of an actuarial calculation which has established, to the extent possible, that the contributions will, if continued, be sufficient to maintain the Plan on a permanent basis. However, it is recognized that the benefits provided by this Pension Plan can be paid only to the extent that the Plan has available adequate resources for those payments. No Individual Employer has any

liability directly or indirectly to provide the benefits established by this Plan beyond the obligation of the Individual Employer to make contributions as stipulated in any Collective Bargaining Agreement. In the event that at any time the Pension Fund does not have sufficient assets to permit continued payments under this Pension Plan, nothing contained in this Pension Plan and the Trust Agreement shall be construed as obligating any Individual Employer to make benefit payments or contributions (other than the contributions for which the Individual Employer may be obligated by any Collective Bargaining Agreement) in order to provide for the benefits established by the Pension Plan. Likewise, there shall be no liability upon the Board of Trustees, individually or collectively, or upon the Employers, Signatory Association, Individual Employer, or Union to provide the benefits established by this Plan if the Pension Fund does not have the assets to make such benefit payments."

7. At all times the Plan has contained a provision in Article VIII, Section 2, thereof as follows:

"This Plan has been adopted on the basis of an actuarial estimate which has estabiished (to the fullest extent possible) that the income and accruals of the Fund will be fully sufficient to support this benefit plan on a permanent basis. However, it is recognized as possible that in the future the income or the liabilities of the Fund may be substantially different from those previously anticipated. It is understood that this Pension Plan can be fulfilled only to the extent that the Fund has assets available from which to make payments. Consequently, the Board of Trustees may have prepared annually an Annual Actuarial Evaluation of the Fund and shall

take the actuarial status of the Fund into account in determining amendment or modification of this Pension Plan."

8. The Corporation has no authority over any pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains, and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account (herein called a "defined contribution plan"), unless the defined contribution plan promises a fixed benefit and the employer or his representative participated in the determination of that benefit.

9. The Plan is a defined contribution plan under which no fixed benefit is promised.

10. The Trustees heretofore applied to the Corporation for a determination that the Plan is a defined contribution plan and that the Corporation has no authority over the Plan. A true copy of the Trustees' written request for determination submitted to the Corporation is attached hereto as Exhibit "A" and by reference incorporated herein.

11. The Corporation has unlawfully and arbitrarily refused to determine the Plan to be a defined contribution plan, and has unlawfully and arbitrarily determined the Plan to be a defined benefit plan over which the Corporation exercises substantial control. A true copy of the written determination by the Corporation is attached hereto as Exhibit "B" and by reference incorporated herein.

12. The exercise of authority by the Corporation over the Plan has damaged the Trustees, and threatens further damage to the Trustees throughout the indefinite future, as follows:

(a) The Trustees have been required to pay and have paid to the Corporation the sum of $12,043.00 as a termination insurance premium in order to avoid assessment of a late payment charge not exceeding one hundred percent (100%) of said amount, plus interest, and the Corporation threatens to require additional payments each in a similar or greater amount annually throughout the indefinite future.

(b) The Corporation has impaired the discretion and authority of the Trustees to administer the Plan in accordance with the Trust Agreement and the Plan by purporting to regulate, control and approve or disapprove modificatons of the Plan by the Trustees.

(c) The Corporation's exercise of authority over the Plan violates and invalidates the express terms of the Trust Agreement and the Plan, which define the limit of the Employers' liability as the payments required by the collective bargaining agreements between the Employers and the Union, and substitutes therefor the unknown future cost of providing benefits described in the Plan. The Corporation requires the reporting of any amendment of the Plan which may decrease the benefit payable to any participant of the Plan, and the Corporation purports to hold the authority to approve or disapprove any such amendment of the Plan. Pursuant to the Corporation's action, any amendment to the Plan which may increase the benefit payable to any participant of the Plan would correspondingly increase the liability of the Employers. Any such increase in liability of the Employers will cause bargaining between the Employers and the Union on the subject of the amendment to the Plan, and thereby deprives the Trustees of the discretion and control of the Plan necessary to

perform their duties as fiduciaries to administer the Plan in the interest of the participants and in accordance with the terms of the Trust Agreement and the Plan.

(d) The Corporation imposes on the Employers and all other contributing employers of the Plan the risk of liability to the Corporation in an amount as much as thirty percent (30%) of the net worth of each employer. Further, the Corporation purports to have the authority to require the Employers and all other contributing employers of the Plan to pay to the Corporation substantial sums in amounts presently unknown as premiums to insure against the above-described risk.

13. The Corporation contends that such damages are caused by the Trustees and such additional risk and liability are imposed upon the Employers and all other contributing employers of the Plan through the enactment of federal statutory law creating and empowering the Corporation and modifying the rights and obligations of the Employers, the Union, the Trustees and the participants under the pre-existing collective bargaining agreements, Trust Agreement and Plan. The Trustees contend that such contentions by the Corporation are arbitrary and contrary to the express terms of the statutory enactment; further, that the Corporation's contentions directly contravene the express terms of the collective bargaining agreements, the Trust Agreement and the Plan and giving legal effect to such contentions will impair the valuable consensual contract rights of the Employers, the Union, the Trustees and the participants; and, further, that the Corporation's actions and contentions hereinabove described seek and threaten to deprive the Employers, the Union, the Trustees and the participants of their just and

lawful property without the due process of law and without just and adequate compensation.

14. The damages to the Trustees caused by the Corporation are continuing and irreparable. The Trustees have no complete remedy at law.

15. By reason of the foregoing, an actual controversy has arisen and exists between the Trustees and the Corporation with respect to whether the Corporation has erroneously applied the law to the facts to determine that the Plan is a defined benefit plan subject to the authority of the Corporation.

SECOND CLAIM FOR RELIEF

16. The allegations of paragraphs 1, 2, 3, 4, 5, 6, 7 and 14 are incorporated to the same effect as if set forth at length.

17. The terms and provisions of the Trust Agreement and the collective bargaining agreement, as modified and amended from time to time, were negotiated through good faith collective bargaining between the Union and the Employers. The Union has been at all times, and is, the lawful representative of all participants in the Plan for purposes of collective bargaining with the Employers.

18. The collective bargaining agreement reached by the Union and the Employers has obligated each Individual Employer to pay a certain fixed amount to the Trust for each hour of employment of each employee covered by the agreement. The Employers did not promise to provide a fixed pension benefit to any employee represented by the Union.

19. The Employers and each Individual Employer relied upon the collective bargaining agreement made with the Union as establishing the full amount of compensation

due from the Individual Employer for the employment duties performed by employees represented by the Union. The Union relied upon the agreement of the Employers that each Individual Employer would pay to the Trust certain fixed amounts of money, which could thereafter be administered by the Trustees solely for the benefit of employees represented by the Union and participating in the Trust.

20. The provisions of the collective bargaining agreement, Trust Agreement and Plan together established contractual terms by which the Individual Employers were obligated to pay fixed amounts to the Trust, and the Trustees were authorized to administer and invest the monies received and to design the Plan with estimated pension benefits based on actuarial advice. At all times the Trustees retained authority under the Trust Agreement and the Plan to revise and adjust the benefit levels according to the actuarial experience of the Plan. By this arrangement and design, all investment income, expense, gains and losses were intended to, and did, accrue to the sole benefit of the participants and beneficiaries of the Plan.

21. The Union has agreed to the terms of the collective bargaining agreement and the Trust Agreement to obtain advantages and benefits for employees represented by the Union, including the following:

(a) To induce employers voluntarily to agree to the terms of the collective bargaining agreement;

(b) To induce employers voluntarily to agree to participate in the Trust;

(c) To induce employers voluntarily to agree to pay the highest possible total fixed compensation for its covered employees;

(d) To induce employers voluntarily to agree to permit the Union and its membership to determine unilaterally the amount of total compensation to be allocated to the Trust rather than to wages payable directly to the employees;

(e) To assure that all investment income and gains accrue solely to the benefit of Plan participants and beneficiaries, rather than to the Individual Employers as occurs when an employer promises to pay only the contributions actuarially required to provide a certain fixed pension benefit to the employees;

(f) To establish the Trustees as independent fiduciaries by omitting any authority for the Trustees to incur liabilities or to make promises on behalf of the Individual Employers or the Union, in order that the Trustees could perform their duties without undue interference by employers desiring to control their actions, and in order to preserve the Union's right to insist in collective bargaining upon participation in the existing Trust by all employers.

22. On September 26, 1980, ERISA was amended by enactment of the Multiemployer Pension Plan Amendments Act of 1980 ("Amendments Act") [Pub. L. 96-364]. Section 4201 of ERISA, as amended [29 U.S.C. § 1381], provides that an employer who withdraws from participation in a multiemployer pension plan is liable to the plan in an amount to be determined in accordance with the Amendments Act. Section 4202 of ERISA, as amended [29 U.S.C. § 1382], provides that the plan sponsor of the multiemployer pension plan shall determine the amount of the employer's withdrawal liability, notify the employer of the amount, and collect the withdrawal liability from the employer.

23. The Trust and the Plan are a multiemployer pension plan as defined by Section 4001(a)(3) of ERISA, as amended [29 U.S.C. § 1301(a)(3)]. The Trustees are the plan sponsor of the Trust and the Plan as defined by Section 4001(a)(10) of ERISA, as amended [29 U.S.C. § 1301(a)(10)].

24. Section 4402(e)(2)(A) of ERISA, as amended [29 U.S.C. § 1461(e)(2)(A)] provides that the Part 1 of Subtitle E of Title IV of ERISA [29 U.S.C. §§ 1381-1405] relating to withdrawal liability takes effect on April 29, 1980.

25. Section 4006(a)(3)(A)(ii) of ERISA, as amended [29 U.S.C. § 1306(a)(3)(A)(ii)] requires the Trust to pay to PBGC premiums each year in amounts to be determined by multiplying the number of participants in the Plan by certain rates set forth in the statute.

26. The Trustees have acted pursuant to the requirements of ERISA, as amended, to identify employers who have withdrawn from the Plan, have determined the amount of withdrawal liability applicable to each such employer, and have notified each such employer of the amount of withdrawal liability due and have demanded payment of such amounts. The amount of withdrawal liability demanded in accordance with ERISA, as amended, is substantial in relation to the amount of assets and net worth of each respective withdrawn employer.

27. The provisions of ERISA, as amended, relating to withdrawal liability take the property of each withdrawn employer for the private use and benefit of the Trust and its participants and beneficiaries, in violation of the Fifth Amendment to the Constitution of the United States.

28. The provisions of ERISA, as amended, relating to withdrawal liability do not provide just and adequate

compensation to the withdrawn employer for property taken as withdrawal liability, in violation of the Fifth Amendment to the Constitution of the United States.

29. The provisions of ERISA, as amended, relating to withdrawal liability take the property of the withdrawn employer without the due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

30. The provisions of ERISA, as amended, requiring payment of premiums by the Trust to PBGC take the property of the Trust without the due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

WHEREFORE, plaintiffs pray for damages, declaratory judgment and injunctive relief as follows:

ON THE FIRST CLAIM FOR RELIEF:

1. Damages in the sum of $12,043.00, plus interest from the date said sum was paid to defendant, plus such additional sums, if any, which proof may show were paid to defendant by plaintiffs prior to judgment herein, and interest thereon;

2. A declaratory judgment that the Plan is a defined contribution plan which does not promise a fixed benefit and which is not subject to the coverage or authority of defendant;

3. A declaratory judgment that Sections 4006 and 4007 of ERISA, as enacted in 1974 [29 U.S.C. §§ 1306, 1307, 88 Stat. 1010-1013], requiring payments of amounts as premiums by plaintiffs to defendant violate the provisions of the Fifth Amendment to the Constitution of the United States which guarantee that private property will not be taken without the due process of law, and that

private property will not be taken for private use, and that private property will not be taken for public use without just and adequate compensation and, accordingly, are null and void; and,

4. A permanent injunction restraining defendant, its agents, employees, representatives and all persons in concert with them from enforcing the statute or otherwise acting in any manner inconsistent with the judgment of this Court herein to interfere with the rights of plaintiffs, their agents, employees, representatives and successors.

ON THE SECOND CLAIM FOR RELIEF:

1. A declaratory judgment that Part 1 of Subtitle E of Title IV of ERISA, as amended [29 U.S.C. §§ 1381-1405], violates the provisions of the Fifth Amendment to the Constitution of the United States which guarantee that private property will not be taken for private use, and that private property will not be taken for public use without just and adequate compensation and, accordingly is null and void;

2. A declaratory judgment that Part 1 of Subtitle E of Title IV of ERISA, as amended [29 U.S.C. §§ 1381-1405], violates the provisions of the Fifth Amendment to the Constitution of the United States which guarantee that property will not be taken without the due process of law and, accordingly, is null and void:

3. A declaratory judgment that Section 4006(a)(3)(A)(ii) of ERISA, as amended [29 U.S.C. § 1306(a)(3)(A)(ii)], violates the provisions of the Fifth Amendment to the Constitution of the United States which guarantee that property will not be taken without the due process of law and, accordingly, is null and void; and,

4. A permanent injunction restraining defendant, its agents, employees, representatives and all persons in concert with them from enforcing the statute or otherwise acting in any manner inconsistent with the judgment of this Court herein to interfere with the rights of plaintiffs, their agents, employees, representatives and successors.

Dated: August 16, 1982.

JETT, CLIFFORD & LAQUER

By /s/ WAYNE JETT
WAYNE JETT
Counsel for Plaintiffs

ANSWER OF DEFENDANT PENSION BENEFIT GUARANTY CORPORATION TO FIRST AMENDED COMPLAINT

[Filed Nov. 15, 1982.]

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Civil Action No. 75-2037 DWW

JOHN L. CONNOLLY, et al.,
Plaintiffs,

v.

PENSION BENEFIT GUARANTY CORPORATION,
Defendant.

First Defense

The Amended Complaint of John L. Connolly, C. V. Holder, Howard C. Dennis, John C. Maxwell, James J. Kirst, C. William Burke, Kenneth J. Bourguignon, Joseph H. Seymour, Richard L. Corbit, Harold Edwards, Donald E. Mier, William C. Waggoner, Richard Gannon, and Alfred Harrison, each in his respective capacity as Trustee of the Operating Engineers Pension Trust, fails to state a claim against defendant Pension Benefit Guaranty Corporation (the "PBGC") on which relief can be granted.

Second Defense

For its answer to the specific allegations of the plaintiff's complaint the PBGC states:

FIRST CLAIM FOR RELIEF

1. As applied to those claims initiated through the Amended Complaint that relate to employer withdrawal liability under Sections 4201-4225 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1381-1405, the PBGC denies that this court has jurisdiction over the instant action pursuant to Section 4003(f) of ERISA, 29 U.S.C. § 1303(f). The PBGC admits that plaintiffs seek a declaratory judgment by this action.

2-15. The PBGC restates and incorporates herein its answers to the allegations in paragraphs 2-15 of plaintiffs' original COMPLAINT FOR DECLARATORY JUDGMENT, DAMAGES, INJUNCTION, which plaintiffs filed in this court on June 17, 1975.

SECOND CLAIM FOR RELIEF

16. The PBGC restates and incorporates herein its answers as given above to the allegations of paragraphs 1, 2, 3, 4, 5, 6, 7, and 14.

17. The PBGC is without knowledge or information sufficient to enable it to form a belief as to the truth or falsity of the allegations included in paragraph 17 of the Amended Complaint, and consequently it denies each of those allegations.

18. On information and belief, the PBGC admits the allegation incorporated in the first sentence of paragraph 18 of the Complaint. The PBGC denies any suggestion in that sentence that the collective bargaining agreement is the exclusive source of such obligation.

The PBGC is without knowledge or information sufficient to enable it to form a belief as to the truth or falsity of the allegations included in the second sentence of

paragraph 18 of the Amended Complaint, and consequently it denies each of those allegations.

19. The PBGC is without knowledge or information sufficient to enable it to form a belief as to the truth or falsity of the allegations included in paragraph 19 of the Amended Complaint, and consequently it denies each of those allegations.

20. The PBGC admits that the provisions of the collective bargaining agreement, Trust Agreement and Plan together established contractual terms by which the Individual Employers were obligated to make payments to the Trust, but denies that those instruments were the exclusive sources of such obligation.

The PBGC admits that the Trustees were authorized to administer and invest the monies received by the Trust but denies that the stated instruments were the exclusive sources of such authority. The PBGC denies that the stated instruments invested the Trustees with the authority to design the Plan with estimated pension benefits based on actuarial advice. The PBGC denies that the stated instruments invested the Trustees with unlimited authority to revise and adjust benefit levels according to the actuarial experience of the Plan.

The PBGC denies that by this arrangement and design, all investment income, expense, gains and losses were intended to and did accrue to the sole benefit of the participants and beneficiaries of the Plan.

21. The PBGC is without knowledge or information sufficient to enable it to form a belief as to the truth or falsity of the allegations included in paragraph 21 of the Amended Complaint, and consequently it denies each of those allegations.

22. The PBGC admits the existence of the statutory sections cited by plaintiffs in paragraph 22 of the

Amended Complaint, but relies on those sections to speak for themselves rather than on plaintiffs' characterizations of them.

23. On information and belief, the PBGC admits the allegations contained in paragraph 23 of the Amended Complaint.

24. The PBGC admits the existence of the statutory sections cited by plaintiffs in paragraph 24 of the Amended Complaint, but relies on those sections to speak for themselves rather than on plaintiffs' characterizations of them.

25. The PBGC admits that Section 4006(a)(3)(A)(ii) of ERISA, 29 U.S.C. § 1306(a)(3)(A)(ii), requires the Trust to pay premiums to the PBGC. With respect to the remaining allegations of paragraph 25 of the Amended Complaint, the PBGC admits the existence of the cited statutory provision but relies on that provision to speak for itself rather than on plaintiffs' characterization of it.

26. The PBGC admits, on information and belief, that the Trustees have acted to identify employers who have withdrawn from the Plan. The PBGC admits, on information and belief, that the Trustees have determined the amount of withdrawal liability applicable to such employers. The PBGC admits, on information and belief, that the Trustees have notified such employers of the amounts of withdrawal liability due and demanded payment of such amounts. The PBGC is without knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations in paragraph 26 of the Amended Complaint, and consequently it denies each of those allegations.

27. The PBGC denies the allegation in paragraph 27 of the Amended Complaint.

28. The PBGC denies the allegation in paragraph 28 of the Amended Complaint.

29. The PBGC denies the allegation in paragraph 29 of the Amended Complaint.

30. The PBGC denies the allegation in paragraph 30 of the Amended Complaint.

Third Defense

The plaintiffs lack standing to seek the relief sought in paragraphs 1 and 2 of the Second Claim for Relief.

Fourth Defense

The issues raised by the amendments to the plaintiffs' original complaint are not required to be heard before a three-judge panel.

Fifth Defense

With respect to paragraphs 1, 2 and 4 of the Second Claim for Relief, the action against the PBGC is proscribed by law. Consequently, the court lacks subject matter jurisdiction over it.

Sixth Defense

With respect to paragraph 3 of the Second Claim for Relief, the plaintiffs' asserted case is not ripe for adjudication. Consequently, the court lacks subject matter jurisdiction over it.

Seventh Defense

The Amended Complaint fails to join one or more indispensable parties.

/s/ Henry Rose/PHG
HENRY ROSE,
General Counsel

Local Counsel:

/s/ Baruch A. Fellner/PHG
BARUCH A. FELLNER
Associate General Counsel

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/s/ Peter H. Gould
PETER H. GOULD
Attorney

PENSION BENEFIT
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ORDER GRANTING INTERVENTION

[Filed Dec. 14, 1982.]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 75-2037-DWW

JOHN L. CONNOLLY, et al., etc.,

Plaintiffs,

vs.

PENSION BENEFIT GUARANTY CORPORATION, etc.,

Defendant.

WOODWARD SAND CO., INC.; PENFIELD & SMITH, INC.; KLEMA ENGINEERING, INC.; and MUNICIPAL ENGINEERS, INC.,

Proposed Intervenors.

Plaintiffs, trustees of a pension plan established pursuant to a collective bargaining agreement [Plan], are attacking the constitutionality of the Multi-Employer Pension Plan Amendments Act of 1980 [MPPAA], 29 U.S.C. §§ 1306, 1307 and 1381-1405. The MPPAA requires the Plan to pay termination insurance premiums to defendant Pension Benefit Guaranty Corporation [PBGC] which would cover the Plan if it is terminated without enough assets to pay out vested employee benefits. The MPPAA also states that employers who withdraw from any pension plan will incur withdrawal liability based upon their share of the plan's unfunded vested benefits. Plaintiffs claim that the MPPAA violates the Fifth Amendment because it constitutes a taking without just

compensation and interferes with the bargained-for organization of the Plan which limits an employer's liability to his own contributions.

The applicants seeking intervention [Applicants] are 4 former employer members of the Plan who are subject to sizeable withdrawal liabilities under the MPPAA. Applicants have all filed suits against the PBGC and the plaintiff trustees in United States District Court in the Southern District of California in San Diego seeking, among other things, to have the MPPAA declared unconstitutional as applied to them. [1] They now move to intervene as party plaintiffs in this action. Applicants assert that they may intervene as a matter of right under Fed.R.Civ.P. 24(a)(2) or, alternatively, that the court should grant them permissive intervention under Fed.R.Civ.P. 24(b)(2). Defendant PBGC opposes the intervention. Plaintiff trustees do not oppose the motion so long as the Applicants are limited to litigating issues within the scope of plaintiffs' First Amended Complaint.

The court denies Applicants' motion for intervention as of right, but grants their motion for permissive intervention.

Intervention as a Matter of Right

Under Rule 24(a)(2), a party may intervene in an action as a matter of right if he has

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[1]The names of these cases are as follows: *Woodward Sand Co., Inc. v. Operating Engineers Pension Trust*, Case No. 81-920-N(I); *Roy L. Klema Engineers, Inc. v. Operating Engineers Pension Trust, Pension Guaranty Corp.*, Case No. 82-370-N(1); *Municipal Engineers, Inc. v. Operating Engineers Pension Trust, Pension Benefit Guaranty Corp.*, Case No. 82-372-N(H); and *Penfield & Smith Engineers, Inc. v. Operating Engineers Pension Trust, Pension Benefit Guaranty Corp.*, Case No. 82-371-N(I).

> an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest.

Plaintiffs' First Amended Complaint is a broad attack on the facial constitutionality of the MPPAA and does not address any specific application of the legislation. Specifically, ¶¶ 27-29 of the complaint allege that the MPPAA "take[s] the property of each withdrawn employer for the private use and benefit of the [Plan] . . . in violation of the Fifth Amendment," without "just and adequate compensation," and "without the due process of law." The relief sought by the complaint is merely a declaratory judgment that the MPPAA is unconstitutional and therefore "null and void." Thus, Applicants' "interest" in this action under Rule 24(a)(2) is no greater than any other employer subject to withdrawal liability under the MPPAA.

What makes Applicants' position unique, however, is that their San Diego lawsuits could be impaired by the *stare decisis* effect of the instant action. In particular, Applicants are concerned that this case, being before a 3 Judge Court, will be appealed directly to the Supreme Court well before their San Diego cases. Applicants point to the language of Rule 24(a)(2) and argue that an adverse Supreme Court ruling in this case would "as a practical matter impair [their] ability to protect [their] interests."

The circuits are divided on the question of whether the possible *stare decisis* effect of a case requires intervention as a matter of right. The 5th Circuit only grants intervention if the applicant has a direct interest in the identical property which is the subject of the action. *Atlantis Development Corp. v. United States*, 379 F.2d 818, 829 (5th

Cir. 1967). The 2d and 10th Circuits are more willing to accept *stare decisis* as the basis for intervention as a right without such an identity of interest. *Compare NY PIRG v. Regents*, 516 F.2d 350, 353 (2d Cir. 1975) *with National Resources Defense Council v. NRC*, 578 F.2d 1341, 1345 (10th Cir. 1978).

In *Blake v. Pallan*, 554 F.2d 947 (9th Cir. 1977), the California Commission of Corporations attempted to intervene in an action by the SEC against certain securities brokers. One argument the California Commission made was that the *stare decisis* effect of the federal case would impair its ability to prosecute the defendants under state law. In ruling against intervention, the 9th Circuit attempted to measure the actual effect that an acquittal of the defendants would have on the applicant. The court noted that there was no identity of property interests as existed in *Atlantis Development Corp., supra*, and also observed that the applicant was not limited to the federal courts in protecting its interests. Finally, the court remarked that there would be no *stare decisis* effect at all if the federal case did not reach judgment before the state prosecution.

Following the *Blake* approach, we also note that, unlike *Atlantis Development Corp., supra*, this is not a case determining specific property interests in such a way as to foreclose any further claims to the property. Moreover, there are other cases challenging the MPPAA's constitutionality which could reach the Supreme Court before this case. Two of these cases are scheduled for oral argument before the 9th Circuit this month. *Shelter Framing Corp. v. Carpenters Pension Trust for Southern California*, Appeal No. 82-5460 and *G & R Roofing Co. v. Carpenters Pension Trust for Southern California*, Appeal nos. 82-5461 and 82-5462.

Even assuming that the instant case will be reviewed by the Supreme Court before any others, a ruling by the Court that the MPPAA is constitutional on its face, *i.e.*, rationally designed to protect employees' vested pension benefits by imposing reasonable retroactive liabilities on employers, *See Nachman Corp. v. PBGC*, 592 F.2d 947, 958-61 (7th Cir. 1979), would not eliminate Applicant's claims that the MPPAA is unconstitutional as applied to them. Finally, if Applicants are granted intervention as a matter of right there is no reason why every other plaintiff challenging the MPPAA would not have an equal right to intervene in this action.

For these reasons, this court is not prepared to grant Applicants intervention under Fed.R.Civ.P. 24(a)(2).

Permissive Intervention

Rule 24(b)(2) allows the trial court, in its discretion, to grant permissive intervention "when an applicant's claim or defense and the main action have a question of law or fact in common," unless the intervention would cause undue prejudice or delay. The constitutionality of the MPPAA is such a common question of law. The court does not believe that the intervention will result in undue delay because Applicants have stated that they contemplate no further discovery and the PBGC is already familiar with Applicants' claims from the San Diego litigation.

Finally, Applicants' presence in this action will advance judicial economy and aid in the progress of the trial. Applicants have agreed to stay their San Diego cases if they are permitted to intervene in this case. Furthermore, as Applicants have a more direct financial stake in the outcome of this litigation, (it is they who will have to pay

the withdrawal charges, not plaintiff trustees), their presence will help clarify the issues and make the case more concrete.

Applicants' motion for Intervention as a matter of right under Rule 24(a)(2) is DENIED. Applicants' motion to permissively intervene under Rule 24(b)(2) is GRANTED on the condition that they do not litigate beyond the scope of plaintiffs' First Amended Complaint.

IT IS SO ORDERED.

DATED: This 14 day of December, 1982.

David W. Williams

DAVID W. WILLIAMS,
Senior United States
District Judge

COMPLAINT IN INTERVENTION FOR DECLARATORY AND INJUNCTIVE RELIEF

[Filed Feb. 10, 1983.]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 75 2037 DWW

JOHN L. CONNOLLY, ET AL., ETC.,

Plaintiffs,

PENSION BENEFIT GUARANTY CORPORATION, ETC.,

Defendant.

WOODWARD SAND CO., INC; PENFIELD & SMITH, INC: KLEMA ENGINEERING, INC.; and MUNICIPAL ENGINEERS, INC.

Plaintiffs in Intervention

Plaintiff in Intervention (hereinafter "Intervenors") complain against Defendant, Pension Benefit Guaranty Corporation and allege as follows:

PARTIES

1. Intervenors, Woodward Sand Co., Inc., Penfield & Smith, Inc., Klema Engineering, Inc., and Municipal Engineers, Inc., are California corporations engaged in civil engineering and surveying and/or building material supply business in Southern California. Intervenors are all employers that formerly contributed to the Operating Engineers Pension Trust ("Pension Trust"), the Trustees of which are plaintiffs in this action.

2. Between August and September, 1980, the collective bargaining agreement (with Local 12, International Union of Operating Engineers) of each Intervenor expired. From that time on, each Intervenor ceased to have an obligation to contribute to the Pension Trust, and ceased to be represented, if ever they were, directly or indirectly, by any of the Trustees on matters concerning the Pension Trust.

3. The Trustees are now asserting claims in their first amended complaint which are purportedly on behalf of employers such as Intervenors who have withdrawn from the Pension Trust. As alleged in paragraphs 22 and 26 of the first amended complaint, the Trustees have demanded substantial payments from employers that withdraw from the Pension Trust (including Intervenors), pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA") as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. § 1381, et seq.

4. Intervention is necessary here for Intervenors to protect their legal interests, since they have no adequate remedy at law. The entire focus of the Second Claim for Relief of the first amended complaint is on the harm MPPAA imposes on employers *who have withdrawn* from the Pension Trust, yet no current party to this lawsuit represents any employer in this position. Only by allowing this intervention will the Court have before it directly harmed employers withdrawn from the Trust.

5. The Trustees not only assert claims on behalf of withdrawn employers that they do not represent, but have taken a position here directly contrary to the one they have been required to take in cases pending against the Pension Trust brought by Intervenors in the Southern District of California.

6. Vigorous advocacy of the claims held by withdrawn employers contained in the first amended complaint can be insured only by allowing these withdrawn employers to intervene.

7. Intervenors have a legitimate and necessary interest in being allowed to intervene in this case.

8. Participation by Intervenors in this case will not inject new legal issues into the proceedings, unduly complicate the proceedings with additional factual inquiries, or delay the proceedings in any material respect.

9. Defendant Pension Benefit Guaranty Corporation ("PBGC") is, upon information and belief, a non-profit corporation established within the United States Department of Labor, organized and existing under the laws of the United States (29 U.S.C. § 1302), with its principal place of business in Washington, D.C. The PBGC is the United States governmental agency responsible for enforcing Title IV of ERISA, as amended by MPPAA.

10. Intervenors incorporate by this reference and allege every allegation contained in paragraphs 2, 3, 5, 6, 7, 13, 18, 19, 22, 23, 24, 26, 27, 28, and 29 of Plaintiff Trustees' first amended complaint as though set forth here in full.

11. The issues sought to be litigated by Intervenors are virtually identical to those alleged by the Trustees in the second cause of action of their first amended complaint.

JURISDICTION AND VENUE

12. This action arises under the Constitution of the United States, including without limitation the Fifth Amendment; under ERISA, 29 U.S.C. § 1001 et seq., as

amended by MPPAA; pursuant to 28 U.S.C. § 1331, and under 18 U.S.C. §§ 2001-2202.

13. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b) and (e).

FIRST CLAIM FOR RELIEF

14. Intervenors incorporate by this reference and allege every allegation contained in paragraphs 1 through 10 of this complaint in intervention, inclusive, as though set forth in full herein.

15. Each Intervenor has received from the Plaintiff Trustees a claim for various sums, based upon the withdrawal liability provisions of MPPAA.

16. In accordance with the terms of MPPAA, an arbitration proceeding involving Woodward Sand Company has been conducted and become final (29 U.S.C. § 1401(b)) to determine the reasonableness of the Trustees' actuarial assumption regarding the rate of return on investment. The reasonable rate was determined to be 7.9 percent, and application of the result of the arbitration to each of the Intervenors herein would reduce their withdrawal liability approximately 24 percent.

17. MPPAA was enacted on September 26, 1980, a date *after* each Intervenor had ceased to have an obligation to contribute to the Pension Trust of the Trustees. MPPAA purports to create a new liability which Trustees have asserted against each Intervenor based upon cessation of the obligations of the Intervenors to contribute to the Pension Trust. In the case of each Intervenor, as alleged in paragraph 26 of the Trustees' first amended complaint, the amount claimed by the Trustees, even as reduced by application of the arbitration result, is substantial in relation to the amount of assets and net worth of each respective Intervenor.

18. Intervenors seek a declaration that they are not liable to the Trustees or the PBGC under MPPAA because, as alleged in paragraph 27 of the Trustees' first amended complaint, the statute (on its face and as applied to each Intervenor) takes the property of Intervenors for the private use and benefit of the Trustees and its participants and beneficiaries, in violation of the Fifth Amendment to the Constitution of the United States.

19. Intervenors seek a declaration that they are not liable for withdrawal liability under MPPAA because, as alleged in paragraph 28 of the Trustees' first amended complaint, the statute (on its face and as applied to each Intervenor) does not provide just and adequate compensation to the withdrawn employer for property taken as withdrawal liability, in violation of the Fifth Amendment to the Constitution of the United States.

20. Intervenors seek a declaration that they are not liable for withdrawal liability under MPPAA because, as alleged in paragraph 29 of the Trustees' first amended complaint, the statute (on its face and as applied to each Intervenor) takes the property of the withdrawn employer without the due process of law, in violation of the Fifth Amendment of the Constitution of the United States.

WHEREFORE, Intervenors pray that this Court:

A. Enter a declaratory judgment that:

A.1. Part 1 of Subtitle E of Title IV of ERISA, as amended (29 U.S.C. §§ 1381-1405), violates the provisions of the Fifth Amendment to the Constitution of the United States which guarantee that private property will not be taken for public use without adequate and just compensation and,

A.2. Part 1 of Subtitle E of Title IV of ERISA, as amended (29 U.S.C. §§ 1381-1405), violates the provisions of the Fifth Amendment to the Constitution

of the United States which guarantee that property will not be taken without the due process of law and, accordingly, is unconstitutional and void;

B. Grant a permanent injunction restraining defendant PBGC from requiring Plaintiff Trustees, their agents, employees, representatives and all persons in concert with either of them from enforcing the statute or otherwise acting in any manner inconsistent with the judgment of the Court herein.

C. Grant Intervenors such other and further relief as the Court deems appropriate.

Respectfully submitted,

LUCE, FORWARD, HAMILTON & SCRIPPS

BY: RICHARD M. FREEMAN,
Attorneys for Intervenors

NOTICE OF MOTION AND MOTION OF DEFENDANT PENSION BENEFIT GUARANTY CORPORATION TO STRIKE DECLARATIONS AND EXHIBITS FILED BY PLAINTIFFS AND INTERVENORS

[Filed Jun. 28, 1983.]

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

Civil Action No. 75-2037 DWW RJK DWN

JOHN L. CONNOLLY, *et al.*, etc.
Plaintiffs,

vs.

PENSION BENEFIT GUARANTY CORPORATION,
Defendant.

WOODWARD SAND CO., INC., PENFIELD & SMITH, INC., KLEMA ENGINEERING, INC., and MUNICIPAL ENGINEERS, INC.,
Plaintiffs in Intervention

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PLEASE TAKE NOTICE that the undersigned will bring the following motion for hearing before the United

States District Court, Central District of California, Federal Court Building, 312 North Spring Street, Los Angeles, California 90012, on July 6, 1983 at 9:00 a.m.

Defendant Pension Benefit Guaranty Corporation (the "PBGC") respectfully moves this court to strike the Declarations and Exhibits filed by Plaintiffs and Intervenors in support of their motions for summary judgment. As more fully set forth in the accompanying memorandum, this motion is based on the following:

1. The Declarations and Exhibits constitute an attempt to expand the record in this case beyond the scope of this litigation as set forth in the First Amended Complaint and this court's order allowing intervention.

2. Denial of the motion to strike would necessitate discovery to test new and untried factual material, and thus would jeopardize the prompt resolution of the facial constitutional challenge presented in this case.

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ANSWER OF DEFENDANT PENSION BENEFIT GUARANTY CORPORATION TO COMPLAINT IN INTERVENTION FOR DECLARATORY AND INJUNCTIVE RELIEF

[Filed July 12, 1983.]

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Civil Action No. 75-2037 DWW RJK DWN

JOHN L. CONNOLLY, *et al.*, etc.
Plaintiffs,

vs.

PENSION BENEFIT GUARANTY CORPORATION,
Defendant.

WOODWARD SAND CO., INC., PENFIELD & SMITH, INC., KLEMA ENGINEERING, INC., and MUNICIPAL ENGINEERS, INC.,
Plaintiffs-in-Intervention

First Defense

The Complaint in Intervention (the "Complaint") of Woodward Sand Co., Inc.; Penfield & Smith, Inc.; Klema Engineering, Inc.; and Municipal Engineers, Inc. ("Intervenors") fails to state a claim against defendant Pension Benefit Guaranty Corporation (the "PBGC") on which relief can be granted.

Second Defense

For its answer to the specific allegations of the Complaint the PBGC states:

1. On information and belief, the PBGC admits the allegations of paragraph 1 of the Complaint.

2. The PBGC is without knowledge or information sufficient to permit it to form a belief as to the truth of any of the allegations contained in paragraph 2 of the Complaint.

3. The PBGC admits the existence of the paragraphs of the Trustees' First Amended Complaint and of the statutory provisions cited in paragraph 3 of the Complaint, but relies on those paragraphs and provisions to speak for themselves rather than on intervenors' characterizations thereof.

4. The PBGC denies the allegations of the first sentence of paragraph 4 of the Complaint. The PBGC admits the existence of the Second Claim for Relief of the First Amended Complaint, but relies on it to speak for itself rather than on intervenors' characterization thereof. The PBGC admits that prior to the court's grant of intervention, no party in this lawsuit represented any employer that had withdrawn from the Operating Engineers Pension Trust ("the Pension Trust"). The PBGC is without knowledge or information sufficient to form a belief as to whether those withdrawals have actually taken place and therefore the PBGC denies that intervenors have withdrawn from the Pension Trust.

5. Paragraph 5 of the Complaint states conclusions of law which it is not necessary to admit or deny.

6. The PBGC denies the allegations of paragraph 6 of the Complaint.

7. The PBGC denies the allegations of paragraph 7 of the Complaint.

8. The PBGC denies the allegations of paragraph 8 of the Complaint.

9. The PBGC admits the allegations of paragraph 9 of the Complaint.

10. The PBGC restates and incorporates herein its answers to the allegations in paragraphs 2, 3, 5, 6, 7, 13, 18, 19, 22, 23, 24, 26, 27, 28 and 29 of the plaintiffs' First Amended Complaint.

11. The PBGC denies the allegations of paragraph 11 of the Complaint.

12. The PBGC admits that this action arises under ERISA. The PBGC denies the remaining allegations of paragraph 12 of the Complaint.

13. The PBGC denies the allegations of paragraph 13 of the Complaint.

14. The PBGC restates and incorporates here its answers to the allegations in paragraphs 1 through 10 of the Complaint.

15. On information and belief, the PBGC admits the allegations of paragraph 15 of the Complaint.

16. On information and belief, the PBGC admits that an arbitration proceeding involving Woodward Sand Company has been conducted to determine the reasonableness of the Trustees' actuarial assumption regarding the Trust's rate of return or investment. The PBGC admits that such proceeding determined a rate to be 7.9 per cent. The PBGC denies the remaining allegations of paragraph 16 of the Complaint.

17. The PBGC admits that the Multiemployer Act was enacted on September 26, 1980 and that it imposes withdrawal liability on certain private parties. The PBGC denies the remaining allegations of paragraph 17 of the Complaint.

18, 19, 20. Paragraphs 18, 19, and 20 of the Complaint are statements of intervenors' purpose in this action to which no response is necessary.

Furthermore, the PBGC denies any allegation not specifically admitted.

Third Defense

The issues raised in the Complaint are not required to be heard before a three-judge panel.

Fourth Defense

The intervenors' action against the PBGC is proscribed by law. Consequently, the court lacks subject matter jurisdiction over it.

Fifth Defense

The intervenors have not exhausted their statutorily-mandated administrative remedies. Consequently, the court lacks subject matter jurisdiction over this action.

Respectively submitted,

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General Counsel

BARUCH A. FELLNER
Associate General Counsel

J. STEPHEN CAFLISCH
Special Counsel

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ORDER DENYING MOTION TO STRIKE — ORDER DENYING MOTION FOR A PROTECTIVE ORDER

[Filed July 25, 1983.]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 75-2037-DWW-RJK-DWN

JOHN L. CONNOLLY, et al.,
Plaintiffs,

vs.

PENSION BENEFIT GUARANTY CORPORATION,
Defendant.

WOODWARD SAND CO., INC., PENFIELD & SMITH, INC., KLEMA ENGINEERING, INC., and MUNICIPAL ENGINEERS, INC.,
Plaintiffs-in-Intervention.

Defendant Pension Benefit Guaranty Corporation [PBGC] has moved to strike all exhibits attached to plaintiff Trustees' motion for summary judgment and Intervenors' motion for summary judgment. The PBGC objects to the Trustees' exhibits because they demonstrate the effects of the Multiemployer Pension Plan Amendments Act, 29 U.S.C. § 1302 *et seq.* [MPPAA], "as applied" to the Trustees and therefore expand the scope of this litigation. Specifically, PBGC states that the exhibits (a) describe the collective bargaining arrangements between the Union and the employers, (b) allege the operation of Trust, and (c) state the impact of the MPPAA on the collective bargaining and the Trust's operations.

Despite the PBGC's protestations, all of these issues were raised in the original complaint and the first amended complaint. Paragraphs 17-21 of the first

amended complaint make allegations regarding the collective bargaining efforts of the Union and the employers. Paragraphs 5-8 describe the operation of the Trust, and paragraphs 22-26 allege how the MPPAA has disrupted Trust operations.

Furthermore, even though Trustees attack the "facial" constitutionality of the MPPAA, they must still demonstrate that they have been "injured-in-fact" in order to satisfy Article III "Case and Controversy" standing. *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264, 294-95 (1981); *Warth v. Seldin*, 422 U.S. 490 (1975). Thus, plaintiffs' declarations and exhibits are relevant and do not expand the issues of this litigation beyond the complaint. Defendant's motion to strike plaintiff's exhibits is DENIED.

The PBGC objects to the Intervenors' exhibits because they describe the facts underlying specific assessments of Intervenor's withdrawal liability and the effects of this liability on Intervenors' financial viability. As stated above, Intervenors must make some showing that they are injured by the MPPAA to satisfy Article III standing. Thus, the exhibits are relevant for this limited purpose.

Moreover, Intervenors' summary judgment motion remains an attack on the "facial" constitutionality of the MPPAA and the exhibits' unnecessary detail regarding Intervenors' particular problems does not transform the motion into an "as applied" challenge. To the extent that Intervenors' exhibits may contain irrelevant statements, they will not be considered by this court in ruling on the motion for summary judgment. Defendant's motion to strike Intervenor's exhibits is DENIED.

II

The Trustees have moved for a protective order against further discovery, arguing that the barrage of discovery initiated by the PBGC will distract their counsel from the summary judgment motion. Plaintiffs cite cases which have upheld the denial of a continuance to complete discovery before a summary judgment motion if the moving party was not diligent in pursuing discovery before the motion. *See e.g. Program Engineering, Inc. v. Triangle Publications, Inc.*, 634 F.2d 1188, 1193-94 (9th Cir. 1980).

If the PBGC requests such a continuance, these cases would support the denial of the request. The cases do not, however, support the issuance of a protective order against discovery already noticed.

It is true that the PBGC is requesting a great deal of marginally relevant information from the Trustees and Intervenors and it may well be that responding to this discovery would be overly burdensome. Nevertheless, some of this discovery is clearly valid and, without more guidance, the court cannot determine what discovery is oppressive under Fed.R.Civ. P. 26(c). Plaintiffs' motion for a protective order is therefore DENIED without prejudice.

IT IS SO ORDERED.

DATED: This 20 day of July, 1983.

/s/ David W. Williams

DAVID W. WILLIAMS,
Senior United States District Judge

ORDER

[Filed August 31, 1983.]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 75-2037-DWW-DWN-RJK

JOHN L. CONNOLLY, *et al.*,
Plaintiffs,
vs.
PENSION BENEFIT GUARANTY CORPORATION,
Defendant,
and
WOODWARD SAND CO., INC., PENFIELD & SMITH, INC., KLEMA ENGINEERING, INC., and MUNICIPAL ENGINEERS, INC.,
Plaintiffs in Intervention.

The court has read and considered defendant PBGC's ex parte application for an order shortening time and motion for reconsideration. The court hereby advances these matters and denies both the application and the motion.

This case was scheduled for oral argument on August 15, 1983. At the request of PBGC, the court continued the argument until October 24th solely to accommodate defendant's lawyers' schedules. The court had no intention of permitting more discovery or briefing during the continuance.

Defendant's motion for a reconsideration is DENIED and the court hereby suspends all discovery until the summary judgment motion is decided.

IT IS SO ORDERED.

DATED: This 31st day of August, 1983.

DAVID W. WILLIAMS,
Senior United States
District Judge

ORDER GRANTING SUMMARY JUDGMENT TO DEFENDANT

Filed May 1, 1984.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
THREE JUDGE COURT

NO. CV-75-2037-DWW

JOHN L. CONNOLLY, ET AL., ETC.,
Plaintiffs,

vs.

PENSION BENEFIT GUARANTY CORPORATION, ETC.,
Defendants.

WOODWARD SAND CO., INC.; PENFIELD & SMITH, INC: KLEMA ENGINEERING, INC.; and MUNICIPAL ENGINEERS, INC.
Plaintiffs in Intervention.

Before: NELSON, Circuit Judge, and WILLIAMS and KELLEHER, Senior District Judges.

Plaintiffs, as trustees, ("Trustees") of the Operating Engineers Pension Trust ("Pension Trust"), a joint labor-management employee benefit trust created pursuant to Section 302(c)(5) of the Labor Management Relations Act of 1947 [29 U.S.C. § 186(c)(5)], seek summary judgment against defendant Pension Benefit Guaranty Corporation ("PBGC") to the effect that certain provisions of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* ("ERISA"), as amended by the Multiemployer Pension Plan Amendment Act of 1980 ("MPPAA"), violate the Constitution of the United

States. In particular, the Trustees contend that the provisions of the MPPAA imposing "withdrawal liability" on employers who ceased participation in the Pension Trust violate the fifth amendment of the Constitution by requiring private property to be transferred from one party to a second party for the second party's private use and benefit. In addition, the Trustees contend that the provisions of ERISA, as originally enacted and amended, requiring payments of "premiums" by the Pension Trust to PBGC, failed to accord the due process of law guaranteed by the fifth amendment.

Actions seeking to enjoin the operation of acts of Congress were, until 1976, required to be heard by district courts with three judges on the panel. Since this lawsuit was begun in 1975, it is properly before this three-judge court. *Connelly v. Pension Benefit Guaranty Corp.*, 673 F.2d 1110, 1113-14 n.1 (9th Cir. 1982).

There are no factual issues in dispute in this case. The date of intervenors' withdrawal from the pension plan is not relevant because intervenors do not challenge the retroactive application of the MPPAA. Such a challenge was rejected in *Shelter Framing Corp. v. Pension Benefit Guaranty Corp.*, 705 F.2d 1502 (9th Cir. 1983), *prob. juris. noted sub nom PBGC v. R. A. Gray & Co.*, 52 U.S.L.W. 3308 (Oct. 18, 1983) (hereinafter "*Shelter Framing*"). Moreover, this lawsuit challenges the facial constitutionality of Title IV and the MPPAA and does not challenge the statute as applied to particular persons. Hence, allegations regarding the particularized impact of the challenged legislation on the parties' individual situations are of little relevance. We find that no triable issues of fact exist and, for the reasons set forth below, grant defendant's motion for summary judgment.

BACKGROUND

In 1974, Congress attempted to regulate pension plans in a comprehensive manner.[1] To do so, it enacted the Employee Retirement Income Security Act. Title IV of ERISA was adopted to protect an employee's interest in his accrued benefit rights when a plan failed or terminated with insufficient funds. To achieve this goal, it established a system of termination insurance. *See Nachman Corp. v. Pension Benefit Guaranty Corp.*, 592 F.2d 947, 951 (7th Cir. 1979), *aff'd*, 446 U.S. 359 (1980). This termination insurance program is run by the PBGC. The PBGC is a governmental entity which receives no direct federal appropriations. Instead, it relies primarily on premium payments from private parties to insure against the failure of pension funds.

Upon enactment of ERISA in 1974, the PBGC immediately insured the receipt of all "non-forfeitable benefits" that had been earned by employees in single employer plans. A single employer who wished to terminate his plan was thus first required to notify the PBGC. 29 U.S.C. § 1341(a) (1976). If an investigation subsequently revealed that the plan lacked sufficient assets to pay its "non-forfeitable benefits," the PBGC itself became obligated for the shortfall. *Id.* at § 1341(c), (b).

Multiemployer plan benefits, in contrast, were not insured unconditionally upon enactment, but rather were guaranteed solely at the discretion of the PBGC until January 1, 1978. At that time, the guaranties were to become mandatory. *Id.* at 1381(c)(1). In the interim, the PBGC was authorized to determine on a case-by-case

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[1]Our discussion of the legislative history of the MPPAA is adopted from the discussion set forth in *Peick v. Pension Benefit Guaranty Corp.*, 539 F. Supp. 1025 (N.D. Ill. 1982), *aff'd*, No. 82-2081 (7th Cir. December 19, 1983) (hereinafter "*Peick*").

basis whether it would pay a terminating plan's beneficiaries the difference between the value of their guaranteed benefits and the value of the plan's assets on the date of termination. *Id.* at § 1381(c)(2).

There were several reasons why Congress chose not to insure all multiemployer plan benefits immediately in 1974. Congress viewed multiemployer plans as more stable and secure than single employer plans and thus saw less need to insure the former. *See Connolly v. Pension Benefit Guaranty Corp.*, 581 F.2d 729, 734 (9th Cir. 1978); 126 Cong. Rec. 12,179 (1980) (remarks of Rep. Biaggi). Moreover, Congress was concerned about the potential costs of such a program. Recognizing that it needed more time to study the entire problem, Congress delayed the effective date of the mandatory guarantee program and extended the PBGC's discretionary authority through June 30, 1979. Pub. L. No. 95-214, 91 Stat. 1501 (1977). At the same time, Congress ordered the PBGC to prepare a comprehensive report analyzing the multi-employer situation.

After extensive consideration, the MPPAA was enacted, affecting a variety of major changes in ERISA. Under the MPPAA. the PBGC is required to guarantee certain benefits of covered multi-employer plans. The level of benefits guaranteed by the PBGC under the MPPAA is lower than the level guaranteed prior to the passage of the MPPAA. The premiums employers must pay the PBGC for insurance are significantly higher under MPPAA. The PBGC is also authorized to provide financial assistance to plans which cannot meet their current financial obligations. This permits a plan which is having financial difficulties to continue, and allows employers to continue making contributions to an insolvent plan without incurring liability under ERISA. Under the MPPAA, the insurable event for a plan is its insolvency,

rather than its termination. The MPPAA further provides that the plan benefits are to be funded over a shorter period of time than formerly required and requires arbitration to resolve a wide variety of disputes between trustees and employers. Plaintiffs raise a number of constitutional challenges to the provisions of Title IV and the MPPAA.

DISCUSSION

A. THE TAKINGS CLAUSE.

Plaintiffs argue that contractual provisions creating investment backed expectations constitute compensable property rights just as much as actual ownership of property. Relying primarily on the recent Ninth Circuit case of *Midkiff v. Tom*, 702 F.2d 788 (9th Cir. 1983), *prob. juris. noted*, 52 U.S.L.W. 3342 (November 1, 1983), they argue that employers would normally be required to liquidate other property, such as land, to pay withdrawal liability claims.

Midkiff, on its face, suggests that it does not control the case before us. *Midkiff* insists that if it had been reviewing "a *congressional* determination that there was a public use, not . . . a state legislative determination," it might have reached a different result. 702 F.2d at 798. State legislative pronouncements, *Midkiff* concludes, are entitled to less deference than Congressional determinations. *Id.* Since the case before us, unlike *Midkiff*, involves a congressional finding, we could merely cite this analysis and move on. We choose not to do this, however, because to do so would be to endorse the *Midkiff* logic.

The *Midkiff* analysis seems inconsistent with what little Supreme Court precedent is available. The Supreme Court has never written that state legislative determinations are entitled to less deference than congressional

determinations. To make it seem otherwise, *Midkiff* culls sentences from two unrelated cases, written 15 years apart, and stands them in juxtaposition. Thus, it offers this statement:

> when *Congress* has spoken on the subject 'Its decision is entitled to deference until it is shown to involve an impossibility'

T.V.A. v. Welch, 327 (19?) U.S. 546, 552 (1946), *quoting Old Dominion Land Co.*, 269 U.S. 55, 66 (1925), in contrast with this one:

> where a state legislative determination is involved: "[i]t is well established. that . . . the question what is a public use is a judicial one."

Cincinnati v. Vester, 281 U.S. 439, 446 (1930), and concludes that state legislative findings are accorded little deference. 702 F.2d at 798. The Supreme Court did not intend, in either of these cases, to draw a line between state and federal legislative judgments. In fact, the quotation from *Vester* is equally applicable to Congress, and that from *T.V.A.* equally applicable to the states. Thus, *Midkiff* has created a distinction that the Supreme Court has never recognized and has, in fact, implicitly rejected. *E.g., Berman v. Parker*, 348 U.S. 26, 31-32; *United States v. Gettysburg Electric Ry. Co.*, 160 U.S. 668, 680 (1896).

Moreover, common sense suggests that state legislative determinations, if they are to be treated differently than congressional determinations, should be granted more, not less, deference. The tenth amendment reserves power to the states. To at least one commentator, "it seems clear that the reserve power of the state in the area is greater than the power of the federal government when the federal government is acting within the boundaries of a

state." Conahan, *Hawaii's Land Reform Act: Is It Constitutional?* 6 Hawaii B.J. 31, 37 (1969). Thus, the distinction drawn in *Midkiff* between state and federal legislative findings seems an unlikely one.

The *Midkiff* distinction, however, is unnecessary to our holding here because we find that no "property" was involved in this case. Traditionally, it has been understood that to make a claim under the takings clause, the claimant must prove that "property," in the sense of "the group of rights inhering in the citizen's relation to [a] physical thing," has been "taken." *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945). There has been no "set formula" which the Supreme Court has evolved to determine when " 'justice and fairness' require that economic injuries caused by public action be compensated by the government. . . ." Rather, the Court has examined the "taking question by engaging in essentially ad hoc, factual inquiries that have identified several factors — such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action — that have particular significance." *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979), quoting *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978).

We find that the contractual right which insulates employers from further liability to the pension plans in which they participate is not "property" within the meaning of the takings clause. Although contractual rights may constitute property, *see Lynch v. United States*, 292 U.S. 579 (1934), they must be very explicit to do so. In both *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935), and *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), the parties sought to protect interest in real property. Here, in sharp contrast, we are asked to protect a mere contractual arrangement. The importance of this

distinction was reaffirmed by the Supreme Court in the recent case of *Security Industrial Bank v. United States*, ____ U.S. ____, 103 S. Ct. 407 (1983). Since appellants are unable to identify any interests other than their purely contract-based "right" to avoid liability for further contributions to the pension plans to which they participate, we find no property at issue in this case. We refuse to consider the contingent right to escape one's own liability, in derogation of statutory policies, as property under the takings clause. Accordingly, we find no constitutional violation. *See Peick v. Pension Benefit Guaranty Corporation*, No. 82-2081, slip op. at 53 (7th Cir. Dec. 13, 1983); *Dorn's Transportation Inc. v. I.A.M. National Pension Fund, Benefit Plan A*, No. 82-1141 (D.D.C. January 19, 1984) (hereinafter "Dorn's"); *Speckman v. Paddock Chrysler Plymouth, Inc.*, 565 F. Supp. 469, 472-73 (E.D. Mo. 1983). Since we resolve this issue on the basis of our finding that no "property" is affected by the MPPAA, we need not reach the questions whether a taking occurred or whether such a hypothetical taking would be for a public purpose.

B. DUE PROCESS ANALYSIS.

If they do not affect property, provisions of Title IV and the MPPAA may yet be unconstitutional if they are not grounded in a rational basis. Plaintiffs argue that Title IV and the MPPAA achieve the reverse of their intended results. Specifically, Title IV and the MPPAA increase pension plan terminations and disrupt pension plans in general. Thus, plaintiffs argue, these statutes fail the rational basis test.

The burden of proof is on the challenging party to prove that Congress has acted in an arbitrary and irrational way. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15-16 (1976). Since the due process challenge here involves

only economic rights in general, this court merely must determine whether the statutes bear a rational relationship to their legitimate ends. *United States v. Carolene Products*, 304 U.S. 144 (1938); *Beller v. Middendorf*, 632 F.2d 788, 807-08 (9th Cir. 1980). We find that both Title IV and the MPPAA are founded in rational bases.

To assess the constitutionality of the withdrawal liability provisions of the MPPAA, we must apply the analysis first set forth by the Seventh Circuit in *Nachman Corp. v. PBGC*, 592 F.2d 947, 960-63 (7th Cir. 1979), *aff'd on other grounds*, 446 U.S. 359 (1980) (hereinafter *"Nachman"*). *See Textile Workers Pension Fund v. Standard Dye and Finishing Co., Inc.*, No. 83-7004 (2d Cir. Jan. 9, 1984) (hereinafter *"Textile Workers"*). Although much of the *Nachman* analysis is derived from contract clause considerations, those considerations are applied to the federal government through the due process clause. *See Shelter Framing*, 705 F.2d at 1510-11; *Republic Industries, Inc. v. Teamsters Joint Council No. 83 of Virginia Pension Fund*, 718 F.2d 628 (4th Cir. 1983). *But see Dorn*'s, slip. op. at 15. After pointing out that rationality is determined by comparing the identified problem to the nature and scope of the burden imposed to remedy it, the *Nachman* court considered four separate factors: 1) the reliance interest of the parties affected; 2) whether impairment of the private interest is effected in an area previously subjected to regulatory control; 3) the equities of imposing the legislative burdens; and 4) the inclusion of statutory provisions designed to limit and moderate the impact of the burdens. 592 F.2d at 960. The court emphasized that these four factors were only to be used to determine whether the legislation represented a rational means to a legitimate end, but were not to be used to express judicial approval or disapproval of the balance struck by Congress. *See id.* We address each of these four factors in turn.

First, we must analyze the reliance interest of the parties affected by the statute. Intervenors insist that they have relied on a basic contractual agreement that they will not have to pay more to the pension plan than their original required contributions. In *Nachman*, the court found that the employees' reliance on receiving their vested benefits outweighed the employer's reliance on its ability to terminate its obligations without continuing liability. Concededly, *Nachman* involved a single employer plan, while the instant case involves multiemployer plans where the participants do not have specific promises from their own employers to pay their pension benefits. "It is nonetheless reasonable and fair to conclude that plan participants did expect their employers to continue making contributions necessary to support these expected benefits." *Textile Workers,* slip op. at 943. We conclude that the employers' reliance in their business dealings on their collective bargaining agreements is offset by employees' reliance in their personal affairs on obtaining vested pension benefits. The first *Nachman* factor does not weigh decidedly in favor of either party in this lawsuit.

The second *Nachman* factor is whether impairment of the private interest is affected in an area previously subjected to regulatory control. We find this factor to weigh heavily against the employers here. In *Nachman*, the court wrote that since plan terminations had previously been subject to federal regulation, an employer's expectation that it would not have to fund its plan's vested benefits could be given less weight by Congress. 592 F.2d at 962. In that case, the presence of Internal Revenue Service regulations governing plan terminations mitigated *Nachman's* claim of surprise when ERISA was enacted with termination liability provisions. *Id.* at 962, n. 33. "Just as the employer in *Nachman* was charged with constructive notice that its rights might someday be subject to congressional regulation, so too were plaintiffs

here. Notice was everywhere." *Textile Workers*, slip op. at 945; *See Shelter Framing Corp. v. Pension Benefit Guaranty Corp.*, 705 F.2d 1502, 1512 (9th Cir. 1983) ("Pension plans have, of course, been subject to regulation at least since the passage of ERISA in 1974."). Before the employers decided to close their operations, there had been decades of pre-MPPAA regulation of multiemployer plans under a variety of federal labor and tax laws. *See Peick*, 539 F. Supp. at 1044. "The enactment of ERISA in 1974 provided a comprehensive regulatory scheme mandating employer withdrawal liability in the single employer context." *Textile Workers*, slip op. at 945. This "afforded clear warning that the federal government might one day act again and further buttress the legislative scheme it had created." *Peick*, 539 F. Supp. at 1044-45. (footnote omitted). Unlike *Shelter Framing*, we are not here addressing the effect of "legislative changes which extract a heavy fine for action taken *before* the changes win congressional approval." 705 F.2d at 1512 (emphasis added). Here, of course, the actions are taken *after* congressional approval. We find that the MPPAA's effect was not competely unexpected, and that Act operated in an area that Title IV had previously regulated. The second *Nachman* factor therefore favors the constitutionality of the MPPAA.

The third *Nachman* factor involves weighing the equities of imposing the burden of withdrawal liability on the employer. Here, intervenors insist that the MPPAA has radically changed the pension plan "ground rules" and unfairly burdens employers who withdraw from pension plans.

When drafting the MPPAA, Congress was forced to determine who should bear the burden of any shortfalls in a multiemployer plans. We cannot find it unreasonable for Congress ultimately to decide to require the withdrawing

employers to bear their share of the burden of funding, rather than to leave the remaining employers "holding the bag." *See* 126 Cong. Rec. 20,234 (1980) (remarks of Senator Matsunaga).

The MPPAA itself clearly demonstrates that Congress did not place the entire burden of underfunding on the withdrawing employers. *Textile Workers*, slip op. at 947. Congress, for instance, required employers to make higher minimum contributions than under ERISA, 29 U.S.C. § 1423 (Supp. V 1981); the PBGC's insurance premiums were increased, *id.* § 1306; funds were made available to supplement plan assets so that insolvent plans could continue to operate with reduced benefit payments and without requiring prohibitively high employer contributions, *id.* § 1431; participant's benefits were made subject to limited reductions in financially troubled plans, *id.* § 1426; and the PBGC's guarantee was reduced, *id.* § 1322(a). *See Peick*, 539 F. Supp. at 1051-52; *Textile Workers*, slip op. at 948. Our view of prospective legislation is, of course, quite different from the "disfavor of retrospective legislation" that lay at the core of *Shelter Framing*, 705 F.2d at 1512. We conclude, on balance, that the equities weigh in favor of the employees.

The final *Nachman* factor is whether the statute included provisions to limit and moderate the effect of the burdens it imposed. 592 F.2d at 962-63. The intervenors assert that the MPPAA has almost no moderating features. In a sense, they are correct. The statute does mitigate the effect of withdrawal liability to some extent by: a) limiting liability only to employers who voluntarily withdraw without a successor, 29 U.S.C. §§ 1384, 1390 & 1398, b) limiting the overall amount of withdrawal liability by a *de minimis* rule to eliminate the burden on small employers, 29 U.S.C. §§ 1389, 1405, c) permitting periodic installment payments of withdrawal liability, 29 U.S.C.

§ 1399(c), and d) allowing pension plans to fashion their own withdrawal rules, 29 U.S.C. § 1404. These provisions, however, may provide "little, if any comfort for the employers." *Shelter Framing*, 705 F.2d at 1514. Accordingly, we find the fourth *Nachman* factor to weigh against the MPPAA's constitutionality. On balance, however, the *Nachman* analysis reveals that the MPPAA is constitutional.

C. THE CONTRACT CLAUSE ISSUE.

The employers claim that the MPPAA retroactively impairs contractual relations in violation of the contract clause. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978). They argue that, like the statute struck down in *Allied*, the MPPAA grossly distorts employers' contractual obligations to their former employees by imposing obligations substantially beyond the terms of negotiated employment contracts.

Reliance on *Allied* is misplaced. In that case, the Supreme Court struck down as violative of the contract clause a Minnesota statute imposing pension fund liability on an employer. However, "a number of critical differences exist between the Minnesota statute and the MPPAA. Most significantly, *Allied* involved a state statute, not an act of Congress. The prohibition against impairing the obligation of contracts is directed against state statutes." *Textile Workers*, slip op. at 958. We find the MPPAA to pass contract clause muster.

D. REMAINING CONSTITUTIONAL CONTENTIONS.

Plaintiffs assert that through Title IV Congress unconstitutionally delegated legislative discretion to appropriate agency funds. The argument is that it is improper to allow the PBGC to decide whether to pay unfunded

vested benefits of plans that terminate before January 1, 1978. *See* 29 U.S.C. § 1181(c)(1) (repealed 1980). We find this issue moot since, as of July 1, 1980, the PBGC no longer has this discretionary power.

In the final pages of their Memorandum of Points and Authorities, intervenors raise several constitutional challenges to the MPPAA. They assert that the statute (a) involves a taking of property without a hearing, analogizing MPPAA withdrawal liability to a writ of garnishment, (b) fails to allow judicial participation prior to a seizing of property, (c) violates due process by giving the trustees' calculations of withdrawal liability a presumption of correctness, (d) deprives intervenors of a right to a jury trial, and (e) is unconstitutionally vague.

Intervenors were allowed to join in this litigation "on the condition that they do not litigate beyond the scope of plaintiffs' first amended complaint." *Connolly v. PBGC*, CV 75-2037 (C.D. Cal. 1982) (order granting intervention). The first amended complaint focuses on the MPPAA's disruption of existing collective bargaining relationships, and its alleged unconstitutional taking of property without compensation or rational basis. Nowhere in the complaint are there facts alleged which would support the additional procedural due process claims advanced by the intervenors. These contentions are hereby ordered stricken from the record. They are outside the confines of the first amended complaint and beyond the scope of permissive intervention.

CONCLUSION

Summary judgment is granted in favor of the defendant as to all of plaintiffs' and intervenors' facial constitutional challenges. We do not, however, resolve the constitutionality of the statutes as applied to particular

parties. That issue, not raised by this lawsuit, is being litigated in another district.

SO ORDERED.

The Clerk of the Court shall serve copies of this Order, by United States Mail, upon the attorneys of record for the parties appearing in this action.

Dated: April 25, 1984

/s/ Dorothy W. Nelson
DOROTHY W. NELSON
United States Circuit Judge
Sitting by Designation

/s/ David W. Williams
DAVID W. WILLIAMS
United State District Judge

/s/ Robert J. Kelleher
ROBERT J. KELLEHER
United States District Judge

JUDGMENT

[Filed Dec. 3, 1984. Entered Dec. 4, 1984.]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
THREE JUDGE COURT

No. CV 75-2037-DWW-DWN-RJK

JOHN L. CONNOLLY, ET AL., ETC.,
Plaintiffs,

vs.

PENSION BENEFIT GUARANTY CORPORATION,
Defendant,

and

WOODWARD SAND COMPANY, INC.; PENFIELD AND SMITH, INC.; KLEMA ENGINEERING, INC.; AND MUNICIPAL ENGINEERS, INC.,
Plaintiffs In Intervention.

This Three-Judge Court having been duly convened to hear and determine substantial questions of constitutionality presented by this case, the motions of plaintiffs and plaintiffs-in-intervention for summary judgment came on regularly for hearing on October 24, 1983 in the above-entitled court, all parties appearing through counsel, and the court having considered all the pleadings and the stipulations on file and the oral arguments of counsel having found that there is no genuine issue of fact to be submitted for trial and having concluded that defendant is entitled to judgment as a matter of law, and the court having made and caused to be filed on May 1, 1984, its written Order Granting Summary Judgment To Defendant,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. Part I of Subtitle E of Title IV of the Employee Retirement Income Security Act of 1974, as amended [29 U.S.C. §§ 1381-1405] is hereby declared to be constitutional. Plaintiffs' assertions that through Title IV Congress unconstitutionally delegated legislative discretion to appropriate agency funds are moot, since as of July 1, 1980, the PBGC no longer had this discretionary power.

2. §§ 4006 and 4007 of the Employee Retirement Income Security Act of 1974, as enacted in 1974 (29 U.S.C. §§ 1306, 1307, 88 Stat. 1010-1013), insofar as the terms thereof apply to multiemployer pension plans, are hereby declared to be constitutional.

3. Section 4006(a)(3)(A)(ii) of the Employee Retirement Income Security Act of 1974, as amended [29 U.S.C. § 1306(a)(3)(A)(ii)] is hereby declared to be constitutional.

4. The challenges of plaintiffs-in-intervention Woodward Sand Company, Inc.; Klema Engineering, Inc.; Municipal Engineers, Inc.; and Penfield & Smith, Inc. to the constitutionality of withdrawal liability as applied to them are not before the court.

5. The challenges of plaintiffs-in-intervention to the dispute resolution procedures of ERISA are not before the court. All allegations in support of such challenges are struck from the record of these proceedings.

6. Defendant shall recover from plaintiffs its costs incurred during the pendency of this litigation and from plaintiffs-in-intervention its costs of the litigation of issues argued by plaintiffs-in-intervention.

DATED: This 30th day of November, 1984.

/s/ Dorothy W. Nelson
DOROTHY W. NELSON
United States Circuit Judge

/s/ David W. Williams
DAVID W. WILLIAMS
Senior U.S. District Judge

/s/ Robert J. Kelleher
ROBERT J. KELLEHER
Senior U.S. District Judge

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

[Filed Jan. 31, 1985.]

Three Judge Court

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Civil Action No. 75-2037 DWW-DWN-RJK

JOHN L. CONNOLLY, et al.,
Plaintiffs,
vs.
PENSION BENEFIT GUARANTY CORPORATION,
Defendant.

WOODWARD SAND COMPANY, INC., et al.,
Plaintiffs-in-Intervention.

Notice is hereby given that Woodward Sand Company, Inc., plaintiff-in-intervention in the above-captioned case, for itself alone, hereby appeals to the Supreme Court of the United States from the final judgment entered in this action on December 4, 1984.

This appeal is taken pursuant to Title 28, United States Code, Sections 1253, 2101.

DATE: January 29, 1985

LUCE, FORWARD,
HAMILTON &
SCRIPPS

By:_____
ALBERT T. HARUTUNIAN III
Attorneys for
Woodward Sand
Company, Inc.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

[Filed Jan. 31, 1985.]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
THREE JUDGE COURT

No. CV 75-2037-DWW-RJK-DWN

JOHN L. CONNOLLY, ET AL., ETC.,
Plaintiffs,

vs.

PENSION BENEFIT GUARANTY CORPORATION, a nonprofit corporation established within the Department of Labor of the United States of America,
Defendant.

WOODWARD SAND COMPANY, INC.; PENFIELD AND SMITH, INC.; KLEMA ENGINEERING, INC.; AND MUNICIPAL ENGINEERS, INC.,
Plaintiffs In Intervention.

Notice is hereby given that plaintiffs in the above captioned action, John L. Connolly, *et al.*, each in his respective capacity as Trustee of the Operating Engineers Pension Trust, hereby appeal to the Supreme Court of the United States from the Judgment entered in this action on December 4, 1984.

This appeal is taken pursuant to 28 U.S.C. Section 1253.

JETT, CLIFFORD & LAQUER

By: /s/ Wayne Jett
WAYNE JETT
Counsel for Plaintiffs

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

[Filed Mar. 20, 1985.]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
THREE JUDGE COURT

No. CV 75-2037-DWW-RJK-DWN

JOHN L. CONNOLLY, ET AL., ETC.,
Plaintiffs,

vs.

PENSION BENEFIT GUARANTY CORPORATION, a nonprofit corporation established within the Department of Labor of the United States of America,
Defendant.

WOODWARD SAND COMPANY, INC.; PENFIELD AND SMITH, INC.; KLEMA ENGINEERING, INC.; AND MUNICIPAL ENGINEERS, INC.,
Plaintiffs In Intervention.

Notice is hereby given that plaintiffs in the above captioned action, John L. Connolly, *et al.*, each in his respective capacity as Trustee of the Operating Engineers Pension Trust, hereby appeal to the Supreme Court of the United States from the Judgment entered in this action on December 4, 1984.

This appeal is taken pursuant to 28 U.S.C. Section 1253.

JETT, CLIFFORD & LAQUER

By: /s/ Wayne Jett
WAYNE JETT
Counsel for Plaintiffs